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We have neglected to call attention to the fate, in the Supreme Court of Missouri, of one section of the recent statute of that State, having for its object the punishment of pools, trusts and conspiracies. The section referred to required some officer of every corporation to inform, under oath, the secretary of State (under penalty of fine, imprisonment, etc.) whether such company "has merged all or any part of its business or interest in or with any trust, combination or association of persons or stockholders as named in the provisions of the act," or in other words whether such company has violated said act. The court very properly held that the section is in conflict with the constitutional declaration that "no person shall be compelled to testify against himself in a criminal cause," and is therefore void. The court did not think that the term "criminal cause" referred merely to litigated proceedings in a court of justice, but, on the contrary, that the constitutional provision quoted protects an individual from being compelled to furnish a link to a chain of evidence by which his conviction of a criminal offense may be secured. In this conclusion the court is strongly supported by the decision of the United States Supreme Court in the Counselman case, wherein a somewhat similar provision of the federal constitution was construed as protecting one subpœnæd before the grand jury from making disclosures which might subject him to subsequent prosecution for violation of the interstate commerce act.

It is interesting to study the opinions of the justices of the Supreme Judicial Court of Massachusetts, in answer to the question propounded to them, by the legislature of that State, whether it is within the constitutional power of the legislature to enact a law conferring upon cities and towns within the commonwealth, authority to establish and maintain fuel or coal yards for the purpose of selling coal, wood or other fuel to the inhabitants of such cities and towns. Five of the justices concurred in the opinion that as the legislature can authorize a city or town to tax its inhabitants only for public purposes, and that as none of the purposes for which cities and towns have been authorized to raise money has included anything in the nature of what is commonly called "trade" or "commercial business," the constitution does not contemplate the buying and selling of coal as one of the ends for which the government was established or as a public service for which cities and towns may be authorized to tax their inhabitants. Justice Holmes was of the opinion that when money is taken to enable a public body to offer to the public, without discrimination, an article of general necessity, the purpose is no less public when that article is wood or coal than when it is water, or gas, or electricity, or education, to say nothing of cases like the support of paupers, or the taking of land for railroads or public markets. He saw no ground for denying the power of the legislature to enact the laws mentioned. Justice Holmes answered that the legislature had such power "if the necessities of society as now organized can be met only by the adoption of such measures," but that it does not possess such power "if there is no such necessity but merely an expediency for the trial of an experiment," which is rather an indefinite and unsatisfactory reply. A good many will agree with Justice Holmes in the view that municipalities have as much right to supply coal as they have to furnish gas and water to their inhabitants.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW — IMPAIRING PRIVILEGES OF CITIZENS OF OTHER STATES.—An interesting question of constitutional law came before the Supreme Court of Indiana, in Robey v. Smith, 30 N. E. Rep. 1093. It was there held that Rev. Stat. 1881, § 2988, which provides that "it shall be unlawful for any person, association or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills) for any purpose whatever, who shall not be at the time a *bona fide* resident of the State, and it shall be unlawful for any person who is not a *bona fide* resident

of the State to act as such trustee," etc., is in conflict with Const. U. S. art. 4, § 2, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Miller, J., says:

The constitutionality of this act is vigorously assailed by counsel for the appellant. It is claimed that this act limits the constitutional rights of citizens of this State to select and appoint their own agents in the control and management of their own property, which is one of the inherent and inalienable rights of a citizen. The facts of this case do not require us to enter into a discussion of this question. The contract was entered into in the State of Michigan, by and between citizens of that State, to secure an indebtedness expressly payable in that State. It was to all intents and purposes a Michigan contract, except that, the land being situated within this State, the mortgage, which is a qualified conveyance of real estate, is subject to the law of the State, so far as it affects the validity and enforcement of the lien. 1 Jones, Mortg. § 662. The rights of the citizens of this State to appoint non-resident trustees are not involved in this case.

Another question involved in the consideration of the constitutionality of the act under consideration may be excluded from the present discussion; that is, the right of a non-resident trustee to prosecute in the courts of this State actions affecting the trust property. We infer from the last clause of this section that it was the purpose of the legislature in enacting this statute to compel trustees to reside within the State in order to bring them within the process and subject to the control of the State courts. In the present action the suit was brought by a resident trustee, who owed his appointment to the order of the court, and not to the act of the parties.

We have remaining for determination the question, does or does not this act, as applied to the facts disclosed in the record, impair the privileges and immunities of citizens of another State, or of the United States, as guarantied in article 4, § 2, and the fourteenth amendment of the constitution of the United States? The constitutionality of this act has never been passed upon by this court, although the question seems more than once to have been in the mind of the court. In holding that this act did not apply to trustees appointed prior to the passage of the act, the court in Thompson v. Edwards, 85 Ind. 54, said: "Waiving all discussions as to the power of the legislature to enact such a statute as applicable to trustees to be thereafter appointed, it is manifest," etc. In Bryant v. Richardson, 126 Ind. 145-153, 25 N. E. Rep. 807, it is said that it "may well be doubted" if that portion of this statute which applies to natural persons, and seeks to prohibit them from naming a person who is a non-resident of the State to act as a trustee for them, is valid. In Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co., 27 Fed. Rep. 146, Gresham, J., said of this statute: "It is a statute which denies to residents of other States the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the State, power to convey to any person in trust, not a resident of Indiana, real or personal property within the State. This is a plain discrimination against the residents of other States. If Indiana may disqualify a resident of another State from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself or other creditors, it would seem that the State might prohibit citizens of other States from holding property within the State, and to that extent from doing business within the State. No State can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real and personal property in any State of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship." Section 2, art. 4, of the constitution of the United States, declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." "Attempt will not be made," say the Supreme Court of the United States, in Ward v. Maryland, 12 Wall. 418, "to define the words 'privilege and immunities,' or specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take, and hold real estate." In that case, one of the trustees, at the time of the creation of the trust, was a resident of the State. The resident trustee having died, the action was prosecuted by the surviving and non-resident trustee. The fact that the language above cited was not strictly essential to the determination of the case before the court may impair the force of the decision as an authority, but it does not detract from the potency of its reasoning. Reluctant as we are to hold a statute regularly enacted by the general assembly unconstitutional, we cannot avoid the conclusion that the act under consideration is in conflict with those provisions of the constitution of the United States which guaranties to the citizens of each State, and of the United States, all the privileges and immunities of citizens of the several States. The judgment is reversed, with costs, and cause remanded for further proceedings in accordance with this opinion.

NEGOTIABLE INSTRUMENT — LIABILITY OF INDORSERS — INTEREST. — In Mt. Mansfield Hotel Co. v. Bailey, 24 Atl. Rep. 136, the Supreme Court of Vermont conclude that suit cannot be maintained against the indorser of a note before its maturity for overdue interest, unless proper demand therefor has first been made upon the maker. Ross, C. J., dissents from the implied holding that the indorser's liability might be fixed by demand on the maker before maturity of the note. Tyler, J., says, *inter alia*:

The general rule of law relative to the respective liabilities of the maker and indorser of a promissory note is well defined. The promise of the maker is absolute to pay the note upon presentment at its maturity. The promise of the indorser is conditional that if, when duly presented, it is not paid by the maker,

he, the indorser, will, upon due notice given him of the dishonor, pay the same to the indorsee or other holder. It seems clear that the indorser is not liable for the annual payment of the interest without performance of the conditions by the holder. If he were thus liable, his relation to the note would be like that of a surety or a joint maker, and his promise, instead of being conditional, would be absolute as to the payment of the interest. This is contrary to the general statement of the law that his liability is conditional. The relation of principal does not exist between him and the maker. They are not co-principals. Their contracts are separate, and they must be sued separately, at common law. Rand. Com. Paper, § 739. The maker has received the money of the indorser, and in consideration thereof promises to repay it according to the terms of the note; and, if he fails to pay, his contract is broken, and he is liable for the breach. The contract of the indorser is a new one, made upon a new consideration moving from the indorsee to himself. His undertaking is in the nature of a guaranty that the maker will pay the principal and interest according to the terms of the note. His liability is fixed upon the maker's default upon demand, and notice to him of such default. This new contract cannot be construed as an absolute one to pay the interest without default of or demand upon the maker. The promise cannot be absolute as to the payment of interest when it is clearly conditional as to the payment of the principal. It is held that, though the annual interest upon a promissory note may be collected of the maker as it falls due, it is not separated from the principal, so that the recovery of it is barred by the statute of limitations, until the recovery of the principal is thus barred. Bank v. Doe, 19 Vt. 463. The holder of a note with interest payable annually loses no rights against the parties to it, whether makers or indorsers, by neglecting to demand interest; and he has the election to do so, or wait and collect it with the principal, for it is regarded as an incident of the principal. Bank v. Kirby, 108 Mass. 497. But it is so far an independent debt that he may maintain an action against the makers for it as it annually accrues, or allow it to accumulate, and remain as a part of the debt until the note matures. Catlin v. Lyman, 16 Vt. 44. In the latter course the makers would be chargeable with interest upon each year's interest from the time it was due until final payment. 1 Aiken, 410; Austin v. Imus, 23 Vt. 286. It was said by the court in Tallaferro's Ex'rs v. King's Adm'r, 9 Dana, 331: "The interest, by the terms of the covenant, is made payable at the end of each year, and is as much then demandable if a specific sum equal to the amount of interest had been promised, and, in default of payment, as much entitles the plaintiff to demand interest upon the amount so due and unpaid. The fact that the amount so promised to be paid is described as interest accruing upon a larger sum, which is made payable at a future day, cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration in damages for the detention or non-payment." "It is true that at the maturity of the notes, the defendant would be liable, as indorser, for both principal and interest, upon due demand and notice, although these measures had not been taken to make him chargeable as the interest fell due each year. Notice of the maker's default of payment of interest need not be given annually to the indorser in order to charge him with liability for interest when the note matures. This is so stated by the court in Bank v. Kirby, *supra*. In Howe v. Bradley, 19 Me. 31, it is held that when a note is made payable at some future period, with interest annually till its maturity, and no demand is made for the annual interest as it becomes due, or, if made, no notice thereof is given to the indorser, if duly notified of the demand and non-payment when the note falls due, both principal and interest, the obligation imposed by the law upon the holder is only to demand payment and give the required notice when the bill or note becomes payable. It is not held in this country that interest is subject to protest and notice, according to the law merchant, in order to charge indorsers with it when the note matures. The usual consequence of omission to notify the indorser of the maker's default, namely, the release of the indorser, would not follow the omission to give him annual notice of such default. A note is not dishonored by a failure of the maker to pay interest. First Nat. Bank v. County Commissioners, 14 Minn. 77 (Gil. 59), 100 Amer. Dec. 196 note.

The defendant's counsel argues that it would be inconsistent to hold the indorser liable for interest, which is a mere increment of the principal, until his liability is established to pay the sum out of which the interest springs; that there may be defenses to the note at its maturity which will release the maker, and consequently the indorser, or that the indorser may then be released by neglect of demand and notice. On first impression it might seem inconsistent that the maker should be compelled to pay interest before his liability has been fixed to pay the principal; but that is his contract. It is also argued that the fact that the interest, when uncollected, is an incident of the debt, so that, as it annually falls due, demand and notice are not necessary in order to charge either the maker or the indorser with liability to pay it when the note matures, is ground for holding that the indorser is not liable for interest until he is made liable for the principal. The question is whether the indorser, by the act of indorsement, promises to pay anything on the note till its maturity, at which time he clearly may be made liable for both principal and interest. The note bears upon its face an absolute promise by the maker to pay the principal when it becomes due, and the interest thereon annually. His promise is two-fold. It is as absolute to pay the interest at the end of each year as to pay the principal at the end of the time specified. Now, what is the nature of the contract which the indorser makes with the indorsee? His contract is not in writing, like that of the maker, but his name upon the note is evidence that he has received value for it, and also of an undertaking on his part that it shall be paid according to its tenor. When he indorses it, and delivers it to the indorsee, he directs the payment to be made to the latter, and, in effect, represents that the maker has promised to pay certain sums of money according to the terms of the note,—that is, the principal at maturity, and the interest annually; that, if the maker fails to pay on demand, he, the indorser, will pay on due notice. His conditional promise is concurrent with the absolute promise of the maker. His liability to pay interest and principal, as each respectively falls due, arises from his contract. It is his contract that he will make payment whenever the maker is in default, and he, the indorser, is duly notified thereof.

It is true that interest is an incident, an increment of the principal, and that the holder may wait for it until his note matures, and then collect it with the principal. He may, however, by the contract, collect it, as it falls due, of the maker, and, upon the latter's

default, of the indorser. The courts of England have never recognized the American doctrine that interest is a mere incident, an outgrowth of the principal, and in many cases follows and is recoverable as such without an express contract. Until 37 Hen. ch. 9, it was unlawful to demand interest even upon a contract to pay it. Since the case of De Havilland v. Bowerbank, 1 Campb. 50, interest has been allowed in England upon express contracts therefor, and not otherwise. Where there is such a contract, interest stands like the principal in respect to the rights and liabilities of an indorser. Sedgw. Dam. 383; Selleck v. French, 1 Conn. 32, 6 Amer. Dec. 185, note. In Jennings v. Brush Co., reported in 20 Can. Law J. 361, in a learned opinion by McDowgall, J., it was held that, where there was an express contract to pay interest annually or semi-annually, it was not different from a contract to pay an installment of the principal itself, and that notice to the indorser of the maker's default was necessary to charge the indorser with it. In that case the indorser was released from payment of the first two half-yearly installments of interest for want of demand and notice. While we adhere to the doctrine laid down in Bank v. Doe, *supra*, that interest is, in general, an incident of the debt, it is consistent to hold that, where the indorser is himself a party to the original contract to pay interest annually, as in the case at bar, by his indorsement he guaranties the performance of that contract. Any other holding would make the indorser liable for only a part of the maker's contract.

CARRIERS OF GOODS—CONNECTING LINES—LIMITING LIABILITY.—In McCarn v. International & G. N. R. Co., 19 S. W. Rep. 547, the Supreme Court of Texas review the authorities upon the question as to whether a common carrier may stipulate in a contract of shipment to a point beyond its line that it shall be released from liability after the goods have left its road. The decision is in the affirmative. Stayton, C. J., says:

That in such a case a carrier may by contract protect itself against liability for loss not occurring on its own line, whether the shipment be wholly within this State or be interstate, we had deemed a settled question in this court. Railway Co. v. Baird, 75 Tex. 256, 12 S. W. Rep. 530; Railway Co. v. Williams, 77 Tex. 121, 13 S. W. Rep. 637; Hunter v. Railway Co., 76 Tex. 195, 13 S. W. Rep. 190; Railway Company v. Adams, 78 Tex. 372, 14 S. W. Rep. 666; Harris v. Howe, 74 Tex. 537, 12 S. W. Rep. 224. This is the rule we understand to be recognized by nearly all of the English and American courts. Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. Rep. 425; Pratt v. Railroad Co., 95 U. S. 43; Railroad Co. v. Pratt, 22 Wall. 123; Tardos v. Railroad Co., 35 La. Ann. 15; Railroad Co. v. Meyer, 78 Ala. 597; Railroad Co. v. Brumley, 5 Lea, 401; Mulligan v. Railway Co., 36 Iowa, 186; Detroit & M. R. Co. v. Farmers', etc., Bank, 20 Wis. 124; Pendergast v. Express Co., 101 Mass. 120; Berg v. Railroad Co., 30 Kan. 562, 2 Pac. Rep. 639; Railroad Co. v. Larned, 103 Ill. 293; Field v. Railroad Co., 71 Ill. 462; American Exp. Co. v. Second Nat. Bank, 69 Pa. St. 394; Insurance Co. v. Wheeler, 49 N. Y. 616; Snider v. Express Co., 63 Mo. 382; Taylor v. Railroad Co., 32 Ark. 399; Railroad Co. v. Avant, 80 Ga. 195, 5 S. E. Rep. 78; Schiff v. Railroad Co., 52 How. Pr. 91; Transportation Co. v. Bloch, 86 Tenn. 424, 6 S. W. Rep. 881; Railroad Co. v. Frankenburg, 54 Ill. 88; Burroughs v. Railroad Co., 100 Mass. 26; Express Co. v. Rush. 24 Ind. 403; Railroad Co. v. Montfort, 60 Ill. 175; Railway Co. v. Wilcox, 84 Ill. 239; Aldridge v. Railway Co., 15 C. B. (N. S.) 582. Authorities upon this point might be multiplied. Even the case of Muschamp v. Railway Co., 8 Mees. & W., does not assert a different rule. In England and in some of the States of the Union the mere receipt of goods to be carried to a destination beyond the line of the carrier who first receives them is held to evidence a contract to transport to such destination, while in others such receipt is not held to evidence a contract to convey beyond that carrier's line; but in the jurisdiccion in which these diverse rulings are made there is a general concurrence of opinion in the proposition that the carrier may by special contract exempt itself from liability for an injury to freight resulting after it has gone into the hands of another carrier to be transported to destination. The ground of concurrence is contract, which in some jurisdictions it is held is necessary to relieve from liability for the act of a connecting carrier over whose line the freight must or does pass to its destination, while in the other it is held that, in the absence of special contract, no such liability rests on the receiving carrier for injuries accruing after he has safely passed the freight to a connecting carrier.

There are, however, a few cases in which it has been held that a carrier, under such a contract as that involved in this case, is liable for an injury to freight after it has passed into the hands of a connecting carrier uninjured; and among those are found some decisions by the court of appeals of this State, with which we regret to differ. In Railroad Co. v. Vaughn (Tex. App.), 16 S. W. Rep. 775, the liability of a carrier was asserted, although the shipping contract was substantially the same as that involved in this case; and two cases are invoked as authority for the ruling in that case. One of these is the case of Railway Co. v. Allison (decided by this court), 59 Tex. 193. In that case the plaintiff shipped from Galveston, Tex., to Chicago, Ill., five cars of melons, in cars adapted to their preservation and safe carriage, under an agreement that the melons should be transported in those cars, without change to Chicago. The evidence tending to show that a connecting carrier, to whom the cars were delivered, placed the melons in other cars less adapted to their safe transportation, and that from this injury resulted. The shipping contract provided that the railway company should not be liable for injury resulting from some causes enumerated, and that the company should not "be liable for any damage, loss, or injury occurring not on its own railroad." In disposing of the case it was said that the averments of the petition were to the effect that there was an agreement that the melons should be carried to their destination in the cars in which they were first placed. There is a general expression in the opinion that a carrier undertaking to carry freight to a destination beyond his own line cannot contract that his responsibility shall terminate at the end of his own line; but to ascertain what a court actually does decide, the facts on which the opinion is based must be considered, and no one paragraph in an opinion ought to be considered alone in arriving at the intention of the court. What this court did decide and intend to hold is so clearly expressed in the opinion in the case that we can but feel that, had the whole opinion been read, it ought not to have been understood to lay down any such rule as that it is cited to sustain. It is said that "the exemption from liability is

however, available only when the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route, or forwards the goods by a different conveyance from those contemplated by his agreement, he becomes an insurer of the goods, and cannot avail himself of any exception made in his behalf in the contract." Fatman v. Railroad Co., 2 Disn. 248; Robinson v. Transportation Co., 45 Iowa, 470. "The contract to forward the melons in this case through from Galveston to Chicago on the cars on which they were loaded was an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agents, the connecting line, when the change occurred, for the company, and it became liable, notwithstanding the stipulation against damage beyond its own terminus. A case in point is that of Stewart v. Despatch Co., 47 Iowa, 229. These goods were delivered to a transportation company at Worcester, Massachuseits, to be taken to Muscatine, Iowa, through without transfer, in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transferred to a warehouse, and consumed by fire the same day. It was held that the company was liable for the loss notwithstanding the exemption. The contract in this case, so far as the limitation of liability is concerned, was, in effect, that the defendant company was not to be liable for any damage or loss occurring beyond their own route, provided the freight should not be changed from the cars in which it was shipped." Instead of being a decision in favor of the rule for which it was cited, the direct holding in the opinion, as well as all the implications, are so strongly to the contrary that the views of this court in that case ought not to be misunderstood.

The other case cited in support of the adverse rule is Bank of Kentucky v. Express Co., 93 U. S. 174, but it seems to us the opinion asserts no such rule as it was cited to maintain. That case was simply this: The Southern Express Company and Adams Express Company were engaged in the express business between New Orleans, La., and Louisville, Ky., the former transporting a package of money from New Orleans to Humboldt, Tenn., where it was delivered to the latter for transportation to plaintiff at Louisville. There was a contract between the express companies by which they divided the compensation for such carriage in proportion to the distance a package might be transported by them respectively. Between Humboldt and Louisville both companies employed the same messenger, who was exclusively subject to the orders of the Southern Express Company when south of the northern boundary of the State of Tennessee, and to the orders of the Adams Express Company when north of that boundary. The shipping contract contained a clause exempting the carrier with which it was made from liability for loss "occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or storm," and it provided that this should inure to the benefit of any person or company to whom the property might be delivered for transportation. When the package was delivered at Humboldt to the Adams Express Company's messenger, who was the messenger of both companies, he took charge of it, and placed it in an iron safe, and deposited the safe in an apartment of the car set apart for the use of the express company, for transportation to Louisville. While the train to which the car containing the packages was attached was passing over a trestle, and, while the package was in the exclusive charge of the messenger, the trestle over which the car was passing gave way, and the car was thrown from the track, caught fire from the locomotive, and with the money in the safe, these were together burnt. The action was brought against the Adams Express Company, and, there being some evidence that the accident was caused by a defective trestle, the circuit court in effect instructed the jury that the exceptions from liability found in the shipping contract exempted the express company from liability, even though the accident may have occurred through the negligence of the railway company to transport the express company's messenger and packages in his possession and custody. From this statement it will be seen that no such question was presented in that case as arises in this. The claim was that the shipping contract exempted the express company from liability for a loss occurring through the negligence of the railway company it had employed to transport its messenger and the packages in his exclusive possession. The court, in effect, held that the railway company was the servant of the express company, for whose negligence the latter was responsible, and that for this reason, among others, the exemption from liability could not be allowed. The express company had no means whereby to transport such packages as it might contract to transmit, other than such as it might hire from railway or other companies or persons engaged in the business of transportation; and, if such companies or persons were not to be deemed the servants of the express company, that liability from which the common carrier cannot escape by contract could not be fixed on either in such cases. That the express company was a common carrier in that instance was not denied, and it was declared so to be by the court; but its claim was that it was relieved from liability by the contract. This the court denied on the ground before stated, and then proceeded to show how the case would stand as to the carrier, under the facts of the case, as follows: "Express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case. The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the package in charge. The department in the car was the defendant's for the time being and if the defendant retained the custody of the packages carried instead of trusting them to the company, the latter did not insure the carriage. Miles v. Cattle, 6 Bing. 743; Tower v. Railroad Co., 7 Hill, 47; Redf. R. R. § 74.

. . . Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiff. But, as they were not so delivered, the right of the plaintiff to the extremest constant vigilance during all stages of the carriage is lost if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading." The same court, in the subsequent case of Myrick v. Railroad Co., 107 U. S. 106, 1 Sup. Ct. Rep. 425, said: A railroad company is a carrier of goods for the public,

and, as such, is bound to convey safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line,—the next carrier on the route. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. · · · The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the State courts, amounts to this: That each road, confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

Can an obligation, based alone on contract, arise in the face of an express agreement that it shall not exist? That is the question involved in this and like cases, and to it, in our opinion, there can be but one answer. No court will assert that a common carrier is under obligation to carry, or to contract to carry, beyond its own line; but the decision to which we have referred, and any others that may be in harmony with it, in effect hold that the reception of freight destined, and known to be destined to a point beyond the carrier's line who receives it when the rate for through transit is fixed by that carrier, constitutes a contract by which that carrier assumes the duties and obligations of a common carrier for through transit, and thereby becomes liable for the negligence of every connecting carrier in the route, notwithstanding the initial carrier, in the paper which evidences the only contract, expressly contracts that it shall not be so bound. Such a construction of such a contract, it seems to us, violates every recognized canon of construction applicable to such a matter, and denies effect to the clearly expressed intention of the parties, when the law interposes no obstacle to the enforcement of such intention based on grounds of public policy or other reason. It seems to us a mistake to assume that the initial carrier, throughout an entire route formed by two or more independent but connecting lines, becomes a common carrier when neither the rules of law nor the contract of the parties creates that relation, and upon this false assumption to base the proposition that it cannot exempt itself from liability for the negligence of a connecting carrier because the latter is the agent or servant of the former. If the relation be conceded, the proposition based on it would be a sequence, but, that failing, the conclusion drawn from it falls.

THE FELONIOUS INTENT IN LARCENY

1. No Larceny in Absence of such Intent.
2. Intent must be to Deprive Owner of His Property.
3. Intent to Convert to Taker's Use Unnecessary.
4. Intent to Temporarily Deprive Owner.
5. Intent to Hold for Reward.
6. Rule that Intent must Exist at Time of Taking.
7. Scope and Extent of this Rule.
8. Its Limits and Exceptions.

1. *No Larceny in Absence of Such Intent.*—To constitute the taking of another's property a larceny it must not only be tortious, but it must also be accompanied with circumstances showing a felonious intention.[1]

Thus a person who takes property of another by mistake, without felonious intent, cannot be made criminally liable because the property is ultimately lost through his negligence.[2] In applying this principle no larceny was committed where regular customers of a saloon-keeper applied about midnight to be served, and he refused to get up and serve them, and they carried away refreshments, but next day offered to pay for what they had taken;[3] nor where defendant picked up the property on the road, carried it home, made no attempt to conceal it, but, on the contrary, tried to find its owner;[4] nor in taking a horse which had run astray for years without a known owner.[5] So where it is shown that property was delivered to defendants under a contract of sale, and that they were in possession of it several months holding and using it under the contract, and it does not appear that they had any other than an honest intent at the time they contracted for and received the property, they were not guilty of larceny in carrying it away without paying for it.[6] Again, where upon a settlement between landlord and tenant, under which an unexpired lease was to be surrendered by the landlord, upon the payment of a sum of money by the tenant, a misunderstanding arose as to the amount of the money, and the tenant carried away the lease, the receipt for the money, and the money offered in payment, such taking was

1 Smith v. Schultz, 1 Scam. 490, 32 Am. Dec. 33; Blunt v. Commonwealth, 4 Leigh, 688, 26 Am. Dec. 341; Offutt v. Earlywine, 4 Blatchf. 460, 32 Am. Dec. 40; State v. Hawkins, 8 Port. 461, 33 Am. Dec. 294; State v. South, 4 Dutch. 28, 75 Am. Dec. 250; Lancaster v. State, 3 Cold. 339, 91 Am. Dec. 288; Wilson v. State, 18 Tex. App. 270, 51 Am. Rep. 309; Ainsworth v. State, 11 Tex. App. 339; People v. Frank, 1 Idaho, 200; People v. Walker, 38 Mich. 156; People v. Pollock, 51 Hun, 613; Hart v. State, 57 Ind. 102; Hornbeck v. State, 10 Tex. App. 408; Knutson v. State, 14 Tex. App. 570; Deering v. State, *Id.* 599; Lott v. State, 20 Tex. App. 230; Landin v. State, 10 Tex. App. 63; Mullins v. State, 37 Tex. 337; Martindale v. State, 19 Tex. App. 333; People v. Woodward, 31 Hun (N. Y.), 57; Robinson v. State, 1 Cold. 120, 78 Am. Dec. 487; Umphrey v. State, 63 Ind. 223; Williams v. State, 44 Ala. 396; Winn v. State, 11 Tex. App. 304.

2 Billard v. State, 30 Tex. 367, 94 Am. Dec. 317.

3 Mason v. State, 32 Ark. 238.

4 McLaren v. State, 21 Tex. App. 513.

5 Johnson v. State, 36 Tex. 375. See also Ritcher v. State, 38 *Id.* 643.

6 State v. Shermer, 55 Mo. 83.

not larceny.[7] In Texas, the test of the guilt of one who took an article with the leave of one asserted to be the owner's agent is not whether such an one was in fact the owner's agent but whether defendant believed him to be such.[8] And one cannot be convicted of larceny or of receiving stolen goods in that State upon proof merely that he bought the chattel from another with notice that it had been stolen; but proof of a felonious intent to convert it to his own use is necessary.[9]

2. *Intent Must be to Deprive Owner of His Property.*—The general rule is that the articles taken must have been taken fraudulently and secretly, with the felonious intent of permanently depriving the owner of them.[10] The taking must be an actual and intended fraud upon the rights of another, it must include the purpose and intent to defraud; it must be an intentional taking without the consent of the owner, an intentional fraud and an intentional appropriation.[11] If one takes a horse with intent to convert him to his own use, and wholly to deprive the owner of his property, it is larceny; but otherwise, if he took the horse to facilitate his escape, and left him at a livery stable, without any intention to deprive the owner of his property. In the latter case it would only be a breach of trust.[12] So an indictment for larceny of a slave will not be supported by proof that defendant took the slave from the possession of his master, with the intention of enabling him to obtain his freedom by sending him to a free State.[13]

3. *Intent to Convert to Taker's use Unnecessary.*—It is not necessary to constitute larceny that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker. It is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property.[13a] Thus it was larceny where the prisoner ran away with a horse and carriage, without the owner's knowledge or consent, and with no intention of returning them, and afterwards abandoned them in the street;[14] also where the prisoner went secretly and unlawfully to the stable of another, led therefrom a jack belonging to the latter, and when fifteen or twenty feet from the door of the stable killed the jack, and left it lying on the owner's premises.[15] It does not matter that the object of the taking was revenge, and not gain.[16] So the taking of money with the design to apply it on a debt which the person from whom it is taken owes the taker is larceny.[17] And one who steals a coat, in the pocket of which is a watch of which the thief did not know, steals the watch.[18]

4. *Intent to Temporarily Deprive Owner.*—The taking of the property of another, with the intent of only depriving the owner of the use of it temporarily is not larceny;[19] as where defendant took a locket and necklace belonging to his mistress, not to steal it, but to prevent her going to a place of amusement;[20] or where the accused took his neighbor's horse publicly, in the street of a town, leaving word that he had done so, and manifesting an intention to return him after riding him a few miles;[21] and where the defendants broke into a tool house of a railroad company, took out a hand-car, propelled themselves for twelve miles on the track, and left it at the side of the track.[22]

5. *Intent to Hold for Reward.*—The intent need not be to defraud any particular person, wherefore one may be guilty of theft, although he does not know the owner of the property stolen.[23] Consequently the wrongful taking and carrying away of the property of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny.[24] Thus taking a horse trespassing on the taker's land with intent to conceal it, either until the owner shall offer a reward and then to return it and claim the reward, or until the owner may be induced to sell it for less than its value, is larceny.[25]

6. *Intent Must Exist at Time of Taking.*—To constitute larceny there must have been a felonious intent at the time of the taking;[26] and no subsequent appropriation, however fraudulent, is sufficient, if the taking was lawful.[27] Thus there

7 Com. v. Robinson, Thach. Cr. Cas. 230.

8 Heskew v. State, 18 Tex. App. 275.

9 Parchman v. State, 2 Tex. App. 228; Logan v. State, *Id.* 408. In Devine v. People, while the accused and others were drinking in complainant's saloon one of the party gave a dollar bill to the bar-tender, who gave back the change, and put the bill in the drawer, which he left open. While the bar-tender was stooping to get a bottle from under the counter, accused reached over and took the bill from the drawer. He made no attempt to secret it, and at once returned it saying that "it was done in fun" and the court held that these facts did not justify a conviction of petit larceny. 20 Hun, 98.

10 Dodd v. Hamilton, 2 Tayl. 31; State v. Hawkins, 8 Port. 461; Smith v. Schultz, 1 Scam. 490; Com. v. Low, Thach. Cr. Cas. 477; Felter v. State, 9 Yerg. 397; State v. Ledford, 67 N. C. 60; Johnson v. State, 36 Tex. 375; U. S. v. Durkee, 1 McAll. 196.

11 Wolf v. State, 14 Tex. App. 210.

12 State v. York, 5 Harring. 493; State v. Self, 1 Bay, 242.

13 State v. Hawkins, 8 Port. 461, 33 Am. Dec. 294.

13a Hamilton v. State, 35 Miss. 214; People v. Juarez, 28 Cal. 380; State v. Ware, 10 Ala. 814; State v. Caddle (W. Va.), 12 S. E. Rep. 1098; State v. Slingerland, 19 Nev. 135; Williams v. State, 52 Ala. 411; S. P. State v. Davis, 38 N. J. L. 176; Coomber v. State, 17 Tex. App. 259.

14 State v. Davis, 9 Vroom, 176, 20 Am. Rep. 367.

15 Delk v. State, 63 Miss. 77, 60 Am. Rep. 46.

16 Warden v. State, 60 Miss. 638.

17 Com. v. Stebbins, 8 Gray 492. *Contra*, Wolf v. State, 14 Tex. App. 210.

18 Stevens v. State, 19 Neb. 647.

19 State v. South, 4 Dutch. 28, 75 Am. Dec. 250; Fields v. State, 6 Coldw. 524.

20 Cain v. State, 21 Tex. App. 662.

21 McDaniel v. State, 33 Tex. 419.

22 State v. Ryan, 12 Nev. 401.

23 Lawrence v. State, 20 Tex. App. 536.

24 Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506.

25 Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

26 Fulton v. State, 13 Ark. 168; McDaniel v. State, 8 Smed. & M. 401; State v. Stone, 68 Mo. 101; Wolf v. State, 14 Tex. App. 210; State v. Ware, 62 Mo. 597; Dow v. State, 12 Tex. App. 343; State v. Wood, 46 Iowa, 116; Wilson v. State, 20 Tex. App. 662; Roberts v. State, 21 Tex. App. 460.

27 People v. Call, 1 Denio, 120, 43 Am. Dec. 655; Billard v. State, 30 Tex. 367, 94 Am. Dec. 317; Morrison v. State, 17

is no larceny where, after an innocent taking by mistake, the property was converted to the use of the defendant with a felonious intent.[28] And to make one who sells a horse which he has hired guilty of theft, the felonious intent must have existed at the time the horse was taken into the possession of the hirer.[29] If the taking, though lawful, was obtained by false pretext, or with intent to deprive and appropriate, and the property was appropriated to the taker's use, the offense of theft is complete.[30]

7. *Scope and Extent of This Rule.*—In applying this principle it has been held that one hired to pick cotton, who, after gathering it, converts it to his own use, cannot be convicted of the statutory offense of "larceny of part of an outstanding crop," unless at the time of gathering it he had the present felonious intent to steal it; and where he had the right to retain possession until the cotton was weighed at the close of the day, the mere fact that after picking the cotton he secreted it will not of itself justify the finding that he had the felonious intent to steal it at the time he was picking it.[31] So where goods alleged to have been stolen, were delivered to defendant under a contract of sale, and after keeping and using them several months under the contract, he carried them away without paying for them, it was held that he could not be convicted of larceny.[32] And where a tailor received goods from a firm to be manufactured into coats for the firm, but after making the coats, instead of sending them to his employer he sold them and ran away with the proceeds, it was held that unless he intended to convert the goods to his own use when they were delivered to him, he was not guilty of larceny.[33]

8. *Its Limits and Exceptions.*—A felonious intent at the time of taking is essential to larceny; but where one obtains possession of an article merely to look at it, but without intending to steal, and then embezzles it, he is guilty of larceny; as where an obligor in a bond destroys it with intent to benefit himself after having obtained possession of it on pretense of examining it, even though he did not then intend to destroy it, but conceived the design at the moment of the act of destruction.[34] So if one buys a trunk of the owner's clerk, both ignorant of its contents, and after taking it home discovers clothing therein which he fraudulently retains, he is guilty of theft, though the intent to appropriate did not exist when he received the trunk.[35] The rule is that if a person by committing a trespass, tortiously and unlawfully acquires possession of the personal property of another and afterwards conceives the purpose of fraudulently depriving the owner of it, and in pursuance of that design, with a felonious intent, carries it away and converts it to his own use, he is guilty of larceny.[36] Thus one is guilty of larceny who, without any present intention of theft, obtains possession of another's team by falsely and fraudulently pretending that he wanted to drive it to a certain place to be gone a specified time, when in fact he intended to go to a more distant place, and be absent a longer time, and who, while thus in possession, without the consent of the owner, converts the team to his own use with a felonious intent.[37] And if one, intending to steal another's mule professes to take it as an estray, the taking being a trespass, the intent makes it larceny.[38]

STEWART RAPALJE.

Mount Vernon, N. Y.

Tex. App. 34, 50 Am. Rep. 120; Wilson v. People, 39 N. Y. 459; Cunningham v. State, 27 Tex. App. 479; Quitzow v. State, 1 Tex. App. 65; Hernandez v. State, 20 Tex. App. 151; Lott v. State, 24 Tex. App. 723.

28 People v. Miller, 4 Utah, 410.

29 Morrison v. State, 17 Tex. App. 34, 50 Am. Rep. 120; Hill v. State, 57 Wis. 377; Rumbo v. State (Tex.) 11 S. W. Rep. 680. Compare Warren v. State, 17 Tex. App. 207.

30 Reed v. State, 8 Tex. App. 40.

31 Lyon v. State, 61 Ala. 224.

32 State v. Shermer, 55 Mo. 83.

33 Abrams v. People, 13 N. Y. Supreme, 491. In Pitts v. State, the accused procured his landlord to estray a horse, but at the expense and for the benefit of the accused, who was to retain the possession of the animal. Five months afterwards he sold the horse, and the court held on appeal that, in the absence of evidence to show any false pretext by the accused in obtaining possession of the horse, or that, when he obtained such possession, he intended to deprive the owner of its value and to appropriate it to his own use, a conviction for theft could not be sustained. 3 Tex. App. 210.

In Spinks v. State, the State proved a bailment of cattle by the owner to defendant, who thereupon had an incorrect record made of the owner's brand, and then sold the cattle without the owner's consent. The jury were held to be correctly instructed to acquit unless, from all the evidence, they were satisfied that the defendant, at the very time he obtained possession of the cattle, intended to deprive the owner of their value. 8 Tex. App. 125. In Shinn v. Com. the secretary of an association received a check payable to himself for money borrowed from it, and was indicted for the larceny of the check; and it was held necessary for the jury to be satisfied that the intention to appropriate the check existed before or at the time of its presentment by the defendant at the bank on which it was drawn before they could convict him. 32 Gratt. (Va.) 899.

34 Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670.

35 Robinson v. State, 11 Tex. App. 403, 40 Am. Rep. 790. Compare Rhodes v. State, 11 Tex. App. 563.

36 Com. v. White, 11 Cush. 482.

37 State v. Coombs, 55 Me. 477, 92 Am. Dec. 610.

38 Beatty v. State 61 Miss. 18.

ASSAULT WITH DEADLY WEAPON—FAILURE TO PROVE THAT RIFLE WAS LOADED.

STATE V. HERRON.

Supreme Court of Montana, May 2, 1892.

On a prosecution for an attempt to commit an assault with a deadly weapon it appeared that defendant met a traveler in a road, and, pointing a rifle towards him, commanded him to halt, saying to him, "Turn around quick, or I will blow your head off;" and, "If you move another step forward, I will blow your head off." It was not shown that the rifle was loaded: *Held*, that the fact that the rifle was not loaded was a matter of defense, and the court erred in ruling as a matter of law that it was not a deadly weapon.

DE WITT, J., delivered the opinion:

The information in this case was for an attempt to commit an assault with a deadly weapon, with the intent to commit a violent injury upon the person of George W. Nelson. On the trial of the case the State introduced its testimony, the gist of which, as far as this appeal is concerned, is as follows: The defendant met the complaining witness, Nelson, upon the road. Nelson was driving a team, loaded with wood. Defendant stopped Nelson, and ordered him off the road. Nelson declined to go, when the defendant called to his house for his rifle. Nelson followed the road for about 250 feet, when he was met by the defendant, where the following colloquy took place, quoting Nelson's testimony: "'Will you stop?' I said, 'Yes. You will shoot, will you?' He did not answer, but said, 'Turn around quick, or I will blow your head off;' and I turned around." The witness further testified that the defendant "had the rifle this way,[indicating], one hand on the trigger and one on the barrel. He came up within 20 or 30 feet of me. He had the rifle in front of him, towards me. He said: 'If you move another step forward, I will blow your head off. Turn around, and turn around quick.'" It was further testified on behalf of the State that the defendant pointed the rifle at the complaining witness. Two other witnesses besides Nelson testified to practically the same facts. It appears that the conduct of defendant was angry and threatening. At the close of the testimony for the State the defendant moved the court to instruct the jury to acquit the defendant, on the ground that the material allegations of the information were not proven, in this: that it was not proven that the gun was loaded, and that proof of pointing the gun, with threats, is insufficient to sustain the information. Some other points are discussed by counsel in their briefs, but the proposition upon which the decision below was made was simply that there was a failure of proof that the weapon used was a deadly weapon, for the reason that it was not shown that the gun was loaded. The district court, on this ground, instructed the jury to acquit, and judgment was entered in favor of defendant. The State appeals. The one proposition, as set forth in the statement, will be discussed. It is not questioned but a loaded rifle is a deadly weapon. In this case a rifle was used. It was used with threats. The defendant said that he would blow Nelson's head off. He thus threatened to do that which he could do only if the gun were loaded. The gun could be used, as threatened to be used, only when loaded. Under these circumstances, on an information for an attempt, must the State prove that the gun was loaded, or is it a matter of defense to show the fact (if it be a fact) that there was no load in the gun? This was the proposition fairly before the district court, and that upon which he will decide the appeal. It seems to be a first impression in this jurisdiction. Whether the instrument in question was a deadly weapon has been held to be a question of fact for the jury. Doering v. State, 49 Ind. 56. Also that it was a matter of law for the court. State v. Rigg, 10 Nev. 284; Bish. Crim. Law, § 335. It has also been held that it is sometimes a mixed question of law and fact. *Id.* § 335, note 4. But we may pass a decision of that point. The district court took the matter as a question of law, and we will only inquire whether it was correctly decided from that point of view. The authorities are not uniform. In State v. Napper, 6 Nev. 113, it was directly held, in a case of this nature, that the court should have directed a verdict for the defendant, for the reason that it was not proven that the pistol was loaded. This case cites State v. Swails, 8 Ind. 524. But the latter was a very different case. There it seems to have appeared affirmatively that the gun was charged with only powder and a light cotton wad, and the court held, in the State's appeal, that the following instruction was not error: "If you believe from the evidence that at the time the defendant fired the gun at said Lee it was not charged with anything but powder and a light cotton wad, Swails being at the distance of forty feet from Lee at the time, and that at that distance the life of Lee was not at all endangered or put in jeopardy by the act of Swails in discharging the gun at him, in consequence of the manner in which it was loaded, the defendant cannot be convicted, although he may have thought that the gun was properly loaded with powder and ball, and although he may have intended to murder Lee." This case is also referred to in Whart. Crim. Law, § 1280, cited in the Nevada case above. The Nevada case also cites State v. Neal, 37 Me. 468. But the Maine case does not go to any such extent as does the Nevada case. The case of Fastbinder v. State, 42 Ohio St. 341, decided by a divided court, and cited by respondent, was decided largely upon the ground that the circumstances of the case did not show an intent to commit the offense charged. It is said in State v. Shepard, 10 Iowa, 126: "Mr. Greenleaf (volume 1, § 59) states that the presenting a gun or a pistol at a person is an assault. But he adds that 'whether it be an assault to present a gun or pistol, not loaded, but doing it in a manner to terrify the person aimed at, is a point upon which learned judges have differed in opinion.' It is held to be such in Reg. v. St. George, 9 Car. & P. 483; State v. Smith, 2 Humph. 457. And see Vaughan v. State, 3 Smedes & M. 553; State v. Benedict, 11 Vt. 236. But, on the contrary, see Blake v. Barnard, 9 Car. & P. 626; Reg. v. Baker, 1 Car. & K. 254; Reg. v. James, *Id.* 530.—which last two cases, however, were under a statute. Whart. Crim. Law, p. 545, says that it is not an assault, and cites only the above case of Reg. v. Baker." This opinion further holds: "After reviewing the question in its various lights, we are inclined to hold with those who regard it as an assault where the person aimed at does not know but that the gun is loaded, or has no reason to believe that it is not." Simply pointing a

pistol at one, or drawing a weapon, is not, in itself, an assault, if the person so acting says or does that which makes it clear that he has no intention to commit an assault. Such was the situation in the oft-cited example of him who laid his hand on his sword and said: "If it were not assize time, I would not take such language from you." And also the instance of one remarking: "If it were not for your gray hairs, I would tear your heart out." As remarked in Keefe v. State, 19 Ark. 192: "In these cases there was held to be no assault, because the words explained the act, and took away the idea of an intent to commit an assault." See also, Richels v. State, 1 Sneed, 606 and State v. Church, 63 N. C. 15.

But in the case at bar defendant's declarations of his intent to commit the assault are very plain. Nor does it matter that he put his threats in an alternative,—that is, using the language, "Turn around or I will blow your head off." In the language of the Arkansas case, *supra:* "But where the weapon is drawn, and the threat to use it is merely conditional it may nevertheless be an assault. As where the defendant, standing within a few feet of the prosecutor, presented a pistol at him saying, 'If you do not turn the negro loose, I will shoot you,' etc. State v. Cherry, 11 Ired. 475. So, where the defendant raised an axe, within striking distance of another, and said, 'Give up the gun or I'll split you down,' and the person at the time did not give up the gun, but proposed some arrangement, upon which the defendant let the axe down, it was held that he was guilty of an assault. State v. Morgan, 3 Ired. 186." See, also, Beach v. Hancock, 27 N. H. 223, and Richels v. State, *supra*. Cases wherein it appears in evidence that the gun was not loaded are not in point. If the gun had been shown to be unloaded, that would have presented another question, upon which we are not now called upon to pass. This case is a prosecution for an attempt. The attempt is clear. The intent is expressly declared by defendant himself. The ability is proven,—that is, if the gun was loaded. Under these circumstances it has been held that the gun is presumed to be loaded, (see Keefe v. State, Beach v. Hancock, and Richels v. State, *supra*), and that the fact that it was unloaded was a matter of defense, (see cases last cited above, and Crow v. State, 41 Tex. 468). We find the following in Russell on Crimes, (volume 1, p. 1019): "It has been laid down by a very learned judge, notwithstanding a contrary opinion in an earlier case, that, if a person present a pistol, purporting to be a loaded pistol, so near as to produce danger to life if the pistol had gone off, it is an assault in point of law, although in fact the pistol be unloaded. The learned judge said: 'My idea is that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party "This is an empty pistol," then that would be no assault, for there the party must see that it was not possible that he should be injured; but if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent.'" Reg. v. St. George, 9 Car. & P. 483. See, also, Whart. Crim. Law, § 1244, and State v. Church, *supra*. Although there is a division of views in the decided cases, we think that the better opinion is that, if a fire-arm is the alleged deadly weapon—a weapon the only ordinary use of which is by its being loaded,—if it be pointed at the complainant in a threatening manner, if defendant makes threats to shoot, if the circumstances are such as would exist if one were using a loaded gun,—in short, that if all the elements of the offense be made out, as required by the criminal laws and procedure, except the direct, we may say visual, proof that the weapon is loaded,—under these circumstances a direction to the jury to acquit is error; and that the fact that the gun was unloaded (if such be the fact) is a matter of defense. Such views seems to be held by the weight of authority, and such is the only practical view in the enforcement of the statute in reference to assaults with deadly weapons of this character. It is therefore ordered that the judgment of the district court be reversed, and the case remanded for a new trial.

Blake, C. J., and Harwood, J. Concur.

NOTE.—In considering the question, whether a given state of facts amounts to an assault, the first thing to be noticed is, that this question may be raised in three entirely different classes of cases, namely: In a criminal prosecution for assault, in a civil proceeding by the person assaulted against the person assaulting for damages, and in a criminal prosecution for murder or crime of like class and lower grade, where the accused under the plea of not guilty sets up an assault upon him by the party killed, which justified him in acting in self-defense. In the first class of cases, especially in cases of aggravated assault, that which the law desires to prohibit is the guilty intent, which intent can be shown only by the use of means necessary to carry out that intent. In such cases the impression made upon the mind of the party assaulted would seem to have no effect. In the two other classes of cases reason would suggest, as the governing element, in determining whether certain facts constituted an assault, the effect those facts produced on the mind of the person assaulted, that is, supposing them to be the same that would have been produced on the mind of an ordinary person under like circumstances.

In determining whether a given state of facts amounts to an assault, we should also have clearly in our minds what an assault is. Right here we find a variance among the authorities which will account for the hopeless conflict of the decided cases upon the question under consideration. Justice Cooley defines an assault as "an attempt, with unlawful force, to inflict bodily injury on another, accompanied with the apparent present ability to give effect to the attempt if not prevented." Cooley on Torts, 160. You will observe that he only requires the apparent present ability. In this he is substantially supported by the following: Wharton's Criminal Law, § 603; 2 Bish. Crim. Law, § 23; Pomeroy's note to 1 Arch. Crim. Pr. & Pl. p. 907. On the other hand it is held, that an

assault must be coupled with "the present ability to carry the intent into effect." Chapman v. State, 78 Ala. 463; Tarver v. State, 43 Ala. 354; Hays v. People, 1 Hill (N. Y.), 351; 1 Russell on Crimes, star p. 1019. By these authorities the actual, instead of the apparent ability, is required. Again an assault is defined to be "an unlawful attempt with force or violence to do a corporal hurt to another," leaving present ability, whether apparent or actual, entirely out of consideration. Bouv. Law Dict. 191; Archibald's Crim. Pr. & Pl. star p. 282.

A number of cases, seeming to follow the idea that only an apparent ability is necessary, hold, that presenting an unloaded gun in a threatening manner, when the party at whom it is presented does not know that it is unloaded, and has no reason to believe that it is unloaded, constitutes an assault: State v. Shepard, 10 Iowa, 126; Com. v. White, 110 Mass. 407; Beach v. Hancock, 27 N. H. 223. Drawing a pistol neither cocked nor presented, it not being shown that the pistol was loaded, was held an assault. State v. Church, 63 N. C. 15. Snapping a loaded gun without a cap, defendant not knowing of the absence of the cap, was held an assault. Mullen v. State, 45 Ala. 43.

Other cases, taking the view that actual ability is necessary, hold that it is not an assault to present an unloaded gun. Burton v. State, 3 Tex. Ct. App. 408; Caldwell v. State, 5 Tex. 20; Crow v. State 41 Tex. 468; Agitone v. State, 41 Tex. 501; McKay v. State, 44 Tex. 43; Keefe v. State, 19 Ark. 190, 192; State v. Cherry, 11 Ired. (N. C.) 475; State v. Napper, 6 Nev. 113; Vaughan v. State, 3 Smedes & M. (Miss.) 553; Davis v. State, 5 South. Rep. (Fla.) 803; State v. Godfrey, 20 Pac. Rep. (Oreg.) 625; Chapman v. State, 78 Ala. 463, commented on in 22 Cent. L. J. 123.

A large number of these cases agree with the principal case in holding that the fact of the gun or pistol being unloaded is matter of defense, and must be affirmatively shown by the defense, and until shown to be so it is presumed to be loaded. Burton v. State, Caldwell v. State, Crow v. State, Agitone v. State, Keefe v. State and Cherry v. State. In the case of Vaughan v. State it appeared that the gun was not loaded. It is held in some of these cases, that the State must show the gun to have been loaded. State v. Napper, Davis v. State. That it must be so shown in a criminal prosecution for assault. State v. Godfrey, Chapman v. State. These last two cases hold that, to support a civil action, it is not necessary that the gun should be loaded. It has also been held that, to justify one acting in self-defense, it is not necessary that the gun be loaded. People v. Anderson, 44 Cal. 65; Chapman v. State, 78 Ala. 463.

In the opinion of the writer the weight of authority supports the doctrine, that in a criminal prosecution for assault the fact, that the gun was not loaded may be shown as a defense, but it is not incumbent on the prosecution to show that it was loaded. In civil suits and in questions of self-defense, in view of the great conflict of authority, he would favor following reason, and holding that it is an assault to present an unloaded gun, when the person at whom the gun was presented did not know, nor have reason to believe, the gun unloaded; for one's right to exercise personal liberty is as much invaded by putting him in fear and intimidating him with an unloaded gun as with a loaded one, and in cases of self-defense, if one were required to wait until the gun was shown to be loaded, the doctrine of self-defense would be a mockery. This view harmonizes with those cases above which hold the gun presumed to be loaded until the contrary is shown, the person at whom the gun is pointed being justified in presuming the gun loaded, nothing to the contrary appearing, and acting in self-defense or being put in fear to his damage accordingly, and it, moreover, has the support of some authority. Chapman v. State, *supra;* Godfrey v. State, *supra;* People v. Anderson, *supra.* We would accordingly in defining a criminal assault use the phrase "accompanied with present ability," and in defining assault entitling one to damages in a civil action or an assault justifying self-defense "accompanied with apparent present ability."

It may be noted, as having been held and subsequently denied, that an indictment for assault with intent to kill must state that the gun was loaded. Robinson v. State, 31 Tex. 170. *Contra:* Montgomery v. State, 4 Tex. Ct. App. 140; Payne v. State, 5 Tex. Ct. App. 35; Bradberry v. State, 22 Tex. App. 273. These last hold Robinson v. State to be obsolete. An indictment for assault need not state that the pistol was loaded. State v. Smith, 2 Humph. (Tenn.) 457.

It was held to be an assault to shoot at another at a distance of twenty steps with the gun loaded with powder only. Crumbly v. State, 61 Ga. 582. Where A fired at B at a distance of forty feet, with intent to murder him, believing the gun to be loaded with powder and ball, though in fact it was loaded only with powder and a cotton wad, it was held not an assault with intent to murder. State v. Swails, 8 Ind. 524. The English cases on the subject are scarcely less conflicting than our own. Regina v. Barker, 1 Carr. & Kirw. 255, though often cited on the question, makes no decision of it. In Regina v. St. George, 9 Carr. & P. 483, Baron Parke thought it an assault to point a weapon, though not loaded, at one. But in Blake v. Barnard, 9 Carr. & P. 626, and in Regina v. James, 1 Carr. & Kirw. 530, the court held it not an assault to point an unloaded gun at a person.

St. Louis, Mo. ROBT. W. DUNCAN.

CORRESPONDENCE.

MOTION TO DIRECT VERDICT IN IOWA.

The case of Meyer v. Houck, 52 N. W. Rep. 235, is of great importance to Iowa practitioners. In the case cited it is held "that when a motion is made to direct a verdict, the trial judge should sustain the motion when, considering all the evidence, it clearly appears to him that it would be his duty to set aside a verdict, if found in favor of the party upon whom the burden of proof rests. The adoption of this rule is no abridgment of the right of trial by jury. A party against whom a verdict has been directed by the court can have the ruling of the court reviewed by exception and appeal, just as well as he can if the rule were otherwise, and he takes no appeal to this court from an order granting a new trial after verdict. He has no right to insist that the trial of his cause be continued as a mere idle form, or a mere experiment, that he may have the gratification of securing a verdict which must be set aside. As we have seen, courts very generally now designate such a proceeding as absurd. Probably this court has too long followed the rule to be in position to denounce it in that way; but we think that as the question involves no more than the change of a mere rule of practice, which will be of material advantage in the trial of cases in the saving of the time of the trial courts—time which ought to be devoted to the transaction of legitimate business—and the saving of court expenses to the counties, with no detriment to the rights of anyone, it is high time that this State should adopt the more consistent and logical

practice which now generally prevails everywhere."

Conceding the logic of the rule announced, does it not follow that the overruling of the motion should result in judgment against the moving party? If the saving of time and court expenses are reasons for the rule the result suggested should follow. In all cases of importance (and what lawyer ever tries any but important cases) it is the almost universal practice to file motions for new trials. We can safely assume, therefore, that in a large majority of cases hereafter tried motions to direct verdicts will be made. A full discussion of the motion will follow as a matter of course, as if the motion is sustained, the case is finally adjudicated so far as the trial court is concerned. If overruled the case will proceed to verdict. Time and expense will be saved only in those cases where the motion is sustained. It is questionable whether more time and expense will be saved in such cases than is lost by reason of motions fruitlessly interposed. Why should the side against which the motion is directed take all the risks? Should not the one who interposes the motion take the risk of final judgment in case the ruling is adverse to him? This would save time and expense in every case where this rule of practice is invoked. It may be surmised that the course of practice under the new dispensation will be something as follows: When the plaintiff rests the defendant will ask the court to direct a verdict, and if this is overruled the plaintiff will, at the close of defendant's evidence, test the efficacy of a similar motion. But perhaps it is too early to predict with any degree of certainty just what results will follow the decision in the case cited. WESLEY MARTIN.

COURTS IN TEXAS.

To the Editor of the Central Law Journal:

In Texas, justices of the peace have jurisdiction in civil cases where the amount in controversy is not more than $200. Appeals from these courts go to the county court. County courts have jurisdiction in cases over $200 and not exceeding $1,000. Appeals from these courts go to the Court of Appeal of Texas. District courts have jurisdiction where the amount exceeeds $1,000, and appeals go to the Supreme Court of Texas. Certain acts of the legislature of Texas of which go into effect on the first day of September next, abolish the "Court of Appeals of Texas" and establish a "Court of Criminal Appeals" and a "Civil Court of Appeals," so that we may expect to have one court of last resort for all civil cases in Texas at an early day.

In Gulf, C. S. F. R. Co. v. Vaughn, 16 S. W. Rep. 775, the court of appeals say, in substance: 1. A contract whereby a railroad company agreed to transport a number of car-loads of cattle from Talpa, Texas, a certain distance over its own line, and deliver same to its connecting lines for transportation to Chicago at a fixed rate per car load for the whole distance is a through bill of lading. 2. A stipulation in such bill of lading that the railroad shall not be liable for loss caused by negligence beyond its own line is void. This decision was rendered June 25, 1890, and on April 15, 1892, the Supreme Court of Texas, following and approving its former decisions, and disapproving the above decision by the court of appeals, in the case of McCarn v. I. & G. N. R. Co., say, in substance: A common carrier may stipulate in a contract of shipment to a point beyond its line that it shall be released from liability after the goods have left its road. We recognize that the supreme court has announced the law, and we feel that a legislative enactment is necessary to enable the citizens of Texas to bring their suits at home. If a party litigant, where the amount in controversy is small, must go to another State to bring his suit the cost will be greater than the gain.

LEX.

WEEKLY DIGEST

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1. ACTIONS BY INFANTS — Married Woman as Next Friend.—Rev. St. 1881, § 256, providing that, "before any process shall issue in the name of an infant who is sole plaintiff, a competent and responsible person shall consent in writing to appear as next friend," and shall be liable for costs, is merely directory, in respect to the time when such consent shall be filed, and process may issue and the cause proceed without such consent, until it is required by defendant.—BUDD V. RUTHERFORD, Ind., 30 N. E. Rep. 1111.

2. ADMINISTRATION — Claims.—On application made by heirs directly affected in their distributive share by the allowance of claims against an estate, an order allowing the claims against an estate should be set aside, and further hearing granted, the application being made at the same term, and within a few days after the order of allowance, and being based on a showing of fraud on the part of the administrator and claimant.—IN RE DAVENPORT, Iowa, 52 N. W. Rep. 197.

3. ADMINISTRATION—Claims.—In an action against an administrator, personally, to collect a claim allowed against decedent's estate, the testimony of the administrator that the husband of claimant managed her business when she did not is not objectional as being a conclusion.—GAULT V. SICKLES, Iowa, 52 N. W. Rep. 206.

4. ADMINISTRATION — Claims of Agent against Decedent.—Where plaintiff, an orphan, was from the time she was 14 years of age until she married well taken care of by decedent, who, under contract with her guardian, received her into his family as a member thereof, and treated her as such, she was not entitled

to pay for services while she so stayed with him.—REEVES' ESTATE V. MOORE, Ind., 31 N. E. Rep. 44.

5. ADMINISTRATOR — Who may be Appointed.—Code, art. 93, § 30, provides that, "if there be no relatives, administration shall be granted to the largest creditor applying for the same:" Held, that the fact that the trustee of a company of which decedent had been a shareholder was authorized to collect an assessment against such company, and had obtained judgments against decedent's estate, does not entitle the trustee to be appointed administrator, as a creditor of decedent.—GLENN V. REID, Md., 24 Atl. Rep. 155.

6. APPEAL—Final Judgment.—An order dismissing an action on a contract as to one of several co-defendants, for want of prosecution, is not a final judgment, and an appeal therefrom will be dismissed, but without concluding the right of the parties to a review of such order should a subsequent appeal be taken from a final judgment in this case, involving the rights of the other defendants.—HAGERMAN V. MOORE, Colo., 29 Pac. Rep. 1014.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Defendants executed an assignment as follows: "We hereby assign to C, as trustee, all our book accounts; also promissory notes held by us on the following persons. Said C to collect said notes and accounts, and pay the proceeds" to the cre litors on "their respective claims, which may be filed with him:" Held, that the assignment is valid, the provision making the assignee a trustee giving him power to apply to the court for authority to do any act necessary to the execution of the trust, and the absence of any provision for notice or time within which claims should be filed imposing on the trustee the observance of reasonable notice and time.—BUCK V. CHASE, Iowa, 52 N. W. Rep. 196.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS—Application of Payments.—Where a debtor owes his creditor several different obligations, and for some of them pledges other independent collateral securities, and then fails in business, and assigns all his effects in trust for the benefit of his creditors generally, the creditor has the right to apply collections made by him out of such collateral securities to those specific portions of his claim for the security of which such collaterals were pledged, to the exclusion of other obligations of the debtor held by him that did not enter into the pledge of such collaterals.—COHEN V. L'ENGLE, Fla., 11 South. Rep. 44.

9. ATTACHMENT.—Where, after a debtor has made an assignment for the benefit of all his creditors, a creditor wrongfully, maliciously, and with knowledge of the facts sues out an attachment, and causes the property to be seized and sold, the assignor cannot maintain an action against him for the damages sustained in his property, credit, and reputation, since it was the assignee's duty to protect the property, and sue for the wrongful attachment, and the assignor's remedy, if any, is against him.—ROBY V. MEYER, Tex., 19 S. W. Rep. 567.

10. BANKS—Payments of Deposits.—L sold a consignment of fresh meat for plaintiff, and deposited the proceeds in bank in his own name. L testified that he informed the cashier that the money belonged to plaintiff, and directed him to remit the same to plaintiff, and that the cashier wrote the word "meat" opposite the entry in L's pass book, to show the character of the deposit. The bank applied the deposit to L's overdrafts: Held, in an action against the bank to recover the deposit, that the court erred in instructing the jury to find for defendant.—ARMOUR-CUDAHY PACKING CO. V. FIRST NAT. BANK OF GREENVILLE, Miss., 11 South. Rep. 28.

11. CARRIERS—Passenger—Negligence.—A rule for the government of defendant's employees provided that, when a train was standing at the station, an approaching train should stop, and allow the standing train to clear the station, before proceeding: Held, that even though deceased knew of the rule, and relied on its observance, this did not absolve him from the duty of exercising ordinary care for his own protection.—CHAFFEE V. OLD COLONY R. CO., R. I., 24 Atl. Rep. 141.

12. CARRIERS OF LIVE STOCK—Limiting Liability.—A stipulation in a bill of lading issued by a common carrier that the value of a horse delivered for transportation should not, in case of injury, be considered as exceeding a certain sum, is invalid as against an injury resulting from the negligence of the carrier.—LOUISVILLE & N. R. CO. V. OWENS, Ky., 19 S. W. Rep. 590.

13. CHATTEL MORTGAGE — Validity.—A contract by which defendants agree that the title to all goods thereafter purchased of plaintiff, and all collections and accounts on future sales, should belong to him, and that defendants should be deemed plaintiff's agents for the sale of the goods, is no part of a mortgage of the same date given by defendants to secure the payment of the purchase money of a bill of goods bought of plaintiff, and failure to record the same does not render the mortgage void as to assignment of creditors.—SINGER V. WAMBOLD, Wis., 52 N. W. Rep. 178.

14. CHATTEL MORTGAGE — Validity. — Under Rev. St. 1874, ch. 95, § 4, as amended by Act June 16, 1887, which declares that a chattel mortgage shall be valid from the time it is filed for record until the maturity of the entire debt, provided such time shall not exceed two years, unless within 30 days next preceding the maturity of the debt a certain affidavit be filed for record, a chattel mortgage securing several notes, some of which mature in less and some in more than two years from the date of recording the mortgage, is void as against the mortgagor's creditors, even though the mortgagee, as allowed by the mortgage, declares the whole debt due before the expiration of said two years.—SILVIS V. C. AULTMAN & CO., Ill., 31 N. E. Rep. 11.

15. CHINESE EXCLUSION ACT.—A Chinese merchant domiciled in the United States, on his return thereto from a temporary absence therefrom, is not required to produce the certificate provided for in the act of July 5, 1884, in the case of persons first coming into the United States.—UNITED STATES V. LEE HOY, U. S. C. C. OF APP., 50 Fed. Rep. 271.

16. CONSTITUTIONAL LAW—Confession by Defendant.—The provisions of section 7316, Rev. St., which provide that "if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly," are constitutional and valid.—CRAIG V. STATE, Ohio, 36 N. E. Rep. 1120.

17. CONSTITUTIONAL LAW—Police Power.—The provision of chapter 12, Laws 1891, "regulating the manufacture and sale of lard and of lard compounds and substitutes and of foods prepared therefrom," are valid as a legitimate exercise of the police power of the State.—STATE V. ASLESEN, Minn., 52 N. W. Rep. 220.

18. CONSTITUTIONAL LAW—Statutes.—The constitution of Missouri declares that "the general assembly shall have no power, when convened in extra session by the governor, to act upon subjects other than those especially designated in the proclamation by which the session is called," etc. Const. 1875, art. 4, § 53: Held, that the "Act to provide for the prevention of accidents to railroad employees and others, by requiring that switches, frogs, and guard rails be properly blocked" (Extra Sess. Acts 1887, p. 14), is unconstitutional, the subject thereof not having been so designated by the governor.—WELLS V. MISSOURI PAC. RY. CO., Mo., 19 S. W. Rep. 530.

19. CONTRACT—Parol Evidence.—It is competent for the parties to a written contract to show that it was subsequently modified by parol testimony showing either an express agreement or actions necessarily involving the alteration.—HOLLOWAY V. FRICK, Penn., 24 Atl. Rep. 201.

20. CONTRACT—Partnership.—In an action for breach of a partnership contract, void under the statute of frauds, plaintiff cannot recover the value of his contribution to the partnership which defendant had re-

reived under the provisions of the contract, as such recovery would be founded on a different cause of action from that pleaded.—REED v. MCCONNELL, N. Y., 31 N. E. Rep. 22.

21. CONTRACTS — Validity.—Plaintiff, for a valuable consideration, received possession of a mare under an agreement to breed her at his own expense, and keep her until the colt, which was to belong to plaintiff, was foaled and weaned, when the mare was to be returned to her owner: Held, that this was not an agreement to sell something not *in esse*, and therefore void as to creditors, but a valid agreement for the use of the mare for a special purpose till a certain time.—MAIZE v. BOWMAN, Ky., 19 S. W. Rep. 589.

22. CONVERSION—Pleading and Proof.—In an action for conversion, evidence is admissible under the general denial to prove that the title on which plaintiff's possession was based was void as against defendant, and that the disturbance of such possession was not wrongful.—SWOPE v. PAUL, Ind., 31 N. E. Rep. 42.

23. CORPORATIONS — Charter.—Articles of a corporation which recite that "the total indebtedness of this corporation shall not at any one time exceed $300, except by a majority vote of the stockholders present at a called or annual meeting" comply substantially with Code, § 1061, which provides that "articles of incorporation must fix the highest amount of indebtedness to which the corporation is at any time to be subject."—THORNTON v. BALCOM, Iowa, 52 N. W. Rep. 190.

24. CORPORATIONS—Consolidation.—After plaintiff had subscribed for stock in the P. Ry. Co., and paid 10 per cent. of his subscription, the company was consolidated with defendant, under an agreement by which the stockholders of the P. Ry. Co. were to receive consolidated in place of their original stock: Held, that plaintiff could not compel defendant to issue to him full-paid certificates of stock on account of his subscriptions to the P. Ry. Co. stock, where there was no proof that he had paid more than the 10 per cent. or that he was entitled to full-paid stock of the P. Ry. Co.—BABCOCK v. SCHUYLKILL & L. V. R. Co., N. Y., 31 N. E. Rep. 30.

25. CORPORATIONS—Insolvency—Preferences.—An officer of an insolvent corporation cannot acquire a preference over its unsecured creditors by accepting its bonds on account of his claims against it.—SICARDI v. KEYSTONE OIL CO., Penn., 24 Atl. Rep. 163.

26. COUNTIES—Jail.—In the absence of a statute imposing such liability, a county is not liable in damages for the failure of the board of commissioners to keep the county jail in a pure and inhabitable condition, though the board may be required by statute to build and keep the jail in repair.—MORRIS v. BOARD COMMISSIONERS SWITZERLAND COUNTY, Ind., 31 N. E. Rep. 77.

27. COUNTIES—Defective Bridges.—A county is not liable for injuries sustained by reason of a defective bridge, unless the liability is expressly or by necessary implication imposed by statute.—HEIGEL v. WICHITA COUNTY, Tex., 19 S. W. Rep. 562.

28. COUNTY COURT—Special Assessment—Jurisdiction.—A county court has no jurisdiction at a probate term to confirm a special tax levied to pay for a local improvement.—CITY OF MT. CARMEL v. FRIDRICH, Ill., 31 N. E. Rep. 21.

29. COURTS—Jurisdiction.—Under Laws 1880, ch. 189, § 1, which provides that "the mayor of cities of the second class or incorporated towns shall have exclusive jurisdiction of violations of the city ordinances," the district courts have no jurisdiction of actions to recover penalties for violation of such ordinances.—CITY OF LANSING v. CHICAGO, M. & ST. P. RY. CO., Iowa, 52 N. W. Rep. 195.

30. CRIMINAL EVIDENCE — Homicide.—On a trial for murder, while it is proper, for the purpose of showing a motive for the killing, to prove that deceased procured an indictment against defendant for robbery, and to produce the indictment with the name of deceased as a witness, it is error to admit evidence of the facts connected with the alleged robbery.—MARTIN v. COMMONWEALTH, Ky., 19 S. W. Rep. 580.

31. CRIMINAL PRACTICE.—Where a demurrer to an indictment is sustained, and the defendant discharged by the court of common pleas, the circuit court, under section 7356 of the Revised Statutes, has no jurisdiction, on a petition in error filed in behalf of the State, to review the action of the court of common pleas in sustaining the demurrer.—STATE v. SIMMONS, Ohio, 31 N. E. Rep. 34.

32. CRIMINAL PRACTICE—Malicious Trespass.—An indictment for malicious trespass for injuring a certain saddle, which alleges that the saddle was injured by being cut and destroyed, sufficiently describes the nature of the injury alleged to have been done.—HANNEL v. STATE, Ind., 30 N. E. Rep. 1118.

33. CRIMINAL PRACTICE—Variance.—Where the complaint filed before the magistrate charges defendant with the larceny of three steers, the property of W and J, while the information in the superior court charges him with the larceny of two steers, the property of W, defendant's motion to set aside the information should for that reason have been granted.—PEOPLE v. WALLACE, Cal., 29 Pac. Rep. 950.

34. CRIMINAL TRIAL—New Trial.—The discretion of a trial judge in dealing with motions for a new trial on the ground of the insufficiency of the evidence administered to justify the verdict will not be interfered with, unless it clearly appears to have been exercised in an arbitrary and unjust manner.—STATE v. BILDSTEIN, La., 11 South. Rep. 37.

35. DEED—Covenants Running with the Land.—A provision in a deed of land to a railroad company for a right of way that the grantee shall maintain a fence on each side of said right of way, and put in and maintain a farm crossing and cattle-guards, is a covenant running with the land, and is binding on the grantee, and on a purchaser of the railroad under foreclosure of a mortgage executed before the land was conveyed, since in taking title to the land it must assume the burdens running with it.—LAKE ERIE & W. R. CO. v. PRIEST, Ind., 31 N. E. Rep. 77.

36. DEED—Estoppel.—Where one R fraudulently gave a deed for land not his own, his grantee cannot, in an action by the real owner to set aside such deed, set up as a defense, by way of estoppel, the fact that plaintiff has instituted criminal proceedings against R.—TAAFFE v. KELLEY, Mo., 19 S. W. Rep. 539.

37. DURESS—Recovery of Money.—There may be duress with respect to real property as well as personal, so as to render a payment on account of it involuntary, so that the money may be recovered back.—JOANNIN v. OGILVIE, Minn., 52 N. W. Rep. 217.

38. EQUITY—Pleading.—Under Code, art. 5, § 34, which provides that on appeal in equity no objection to the admissibility of evidence or the sufficiency of the bill shall be made in the court of appeals unless the record shows that such objection was made by exceptions filed in the court below, the court of appeals will decree according to the evidence in the record, whether covered by the averments of the bill or not.—SCHROEDER v. LOEBER, Md., 24 Atl. Rep. 226.

39. EQUITY—Fraud—Rescission of Contract.—In a suit to set aside a sale for fraud, the evidence showed that complainant gave defendant a certificate of deposit issued by a private banking firm in exchange for the note of a third person secured by a mortgage on land; that defendant represented to complainant that said firm was insolvent, that the said land was valuable, that one-third of it was cleared, and that the note would be paid at maturity. It was also shown that these representations were false; that defendant did not believe that said note would be paid at maturity; and that he hurried the exchange through at a time when he knew that the complainant could not examine the land: Held, that the evidence justified a decree setting aside the transaction for fraud.—BORDERS v. KATTLEMAN, Ill., 31 N. E. Rep. 19.

40. EQUITY JURISDICTION—Fraud and Insanity.—Pub. St. ch. 151, § 4, providing that the supreme judicial court shall have jurisdiction in equity in all cases and matters cognizable under the general principles of equity jurisprudence, confers jurisdiction to cancel a deed for fraud and duress, although, under the doctrine as previously declared in Massachusetts, resort could not be had to equity, because such deed is a nullity, and remedy is procurable at law.—BILLINGS V. MANN, Mass., 30 N. E. Rep. 1136.

41. EXECUTORS.—Executors under a joint bond in the form prescribed by Gen. St. ch. 39, art. 1, § 5, conditioned to truly administer, satisfy all legacies so far as the estate will admit, and make proper distribution of all of it, are each liable as a principal, as to the sureties, for the default of the other.—ALBRO V. ROBBINSON, Ky., 19 S. W. Rep. 587.

42. FEDERAL COURTS—Corporations.—A corporation is conclusively presumed to be a resident and inhabitant of the State under whose laws it is created, and an employee, a citizen of a foreign State, cannot maintain an action for damages against a railroad in a State other than that under whose laws it was organized, merely because its agents are there found engaged in its business —CAMPBELL V. DULUTH, S. S. & A. Ry. Co., U. S. C. C. (Minn.), 50 Fed. Rep. 241.

43. FRAUDS, STATUTE OF — Contract to Mortgage — Fraudulent Conveyance.—Defendant borrowed money to make part payment of the purchase price of land, and orally agreed to secure the lender by mortgage on the land so purchased: Held, in a suit for specific performance, that the contract came within the statute of frauds, and that the payment of the money by the lender was not such part performance of the contract as would take it out of the statute.—WASHINGTON BREWERY CO. V. CARRY, Md., 24 Atl. Rep. 151.

44. FRAUDULENT CONVEYANCES — Consideration. — A deed from the maker of a note to the accommodation indorser, in considerations of the latter's agreement to pay the note, will not be set aside as a fraud upon creditors, although the maker made an assignment for the benefit of his creditors the next day, if the amount of the notes fairly represents the value of the property, and it cannot be shown that the grantee participated in any fraud that might have been intended in the conveyance to him.—ELLIS V. HERRIN, N. J., 24 Atl. Rep. 129.

45. GAMBLING CONTRACT—Broker.—Plaintiffs deposited money with defendant, their broker, as margins on stock to be bought and sold in speculation by plaintiff's order. After several deals, an account was rendered, and the profits paid over to plaintiffs leaving in defendant's hands the amount of the original deposit, subject to plaintiffs' further order, which defendant afterwards refused to pay to plaintiffs: Held, in *assumpsit* therefor, that though the buying and selling of the stock on margins might have been illegal as gambling transactions, as the transactions had been closed, defendant was liable for the amount remaining in his hands.—PETERS V. GRIM, Penn., 24 Atl. Rep. 192.

46. GARNISHMENT—Judicial Notice.—On trial of the issue in garnishment, the court will take judicial notice of the judgment against the principal debtor, though rendered before the garnishment proceedings were instituted, as such proceedings are ancillary to the original suit.—KELLY V. GIBBS, Tex., 19 S. W. Rep. 563.

47. HIGHWAY—Dedication.—Where no offer to dedicate land as a public street is made or intended by the owner, but fences are maintained, and an attempt to open it as a street is resisted, a public map made by the city, on which the land is laid down as a street, is not of itself evidence of dedication or user, nor is a private map, which has never been filed.—COOK V. SUDDEN, Cal., 29 Pac. Rep. 949.

48. HIGHWAYS—Negligence.—In an action against a town for injuries caused by a defective highway, for the purpose of showing whether defendant did what was reasonable to prevent or remedy the alleged defect, it is proper to admit evidence as to the population of the town, the valuation, rate of taxation, amount appropriated for highways during the year the accident occurred, and the number of miles of highway in the town.—WEEKS V. INHABITANTS OF TOWN OF NEEDHAM, Mass., 31 N. E. Rep. 8.

49. HOMESTEAD—Pleading.— Where in an action to recover land by a wife, with whom her husband was joined, it was alleged that the land was a part of her homestead, and that it was used as such, and was fenced, no request having been made for a more specific allegation, objection could not be made to the introduction of evidence as to its use as a pasture in connection with their homestead.—PARIS & G. N. RY. CO. V. GREINER, Tex., 19 S. W. Rep. 564.

50. HOMESTEAD—Town Plat.—A 10-acre piece of land, which is left intact and designated as a park or outlot, while the other portions of the tract to which it belongs are subdivided and platted for an addition to a town, is not "within the town plat," within the meaning of section 1996 of the Code, limiting the homestead of one living thereon in such a case to half an acre, but is evidently intended for further subdivision.—FROST V. RAINBOW, Iowa, 52 N. W. Rep. 198.

51. INFANT—Contract.—A reply to a plea of infancy, in an action upon a note, which alleges that after defendant came of age and before suit brought, he ratified his execution of said note by entering into an agreement with plaintiff and his authorized agent in which he promised to pay the same, is not demurrable, since the note of an infant is merely voidable, and may be ratified without a new consideration.—HEADY V. BODEN, Ind., 30 N. E. Rep. 1119.

52. INJUNCTION—"Shooting" Gas Well.—A complaint for an injunction to restrain defendant from "shooting" a gas well on his land adjoining the land of plaintiff, and within 200 feet of the residence of himself and family, with nitroglycerin, which alleges that by shooting the well, and by the accumulation of a large amount of nytroglycerin for that purpose, plaintiff's dwelling and the lives of himself and family will be endangered, if the facts stated are true, shows a private nuisance, and alleges facts sufficient to warrant the granting of an injunction.—TYNER V. PEOPLE'S GAS CO., Ind., 31 N. E. Rep. 61.

53. INJUNCTION — Street Railway — Crossings.—Since Act May 14, 1889, provides that street railways constructed thereunder may "cross at grade, diagonally or transversely, any railroad operated by steam or otherwise," it was proper to continue a preliminary injunction restraining a railroad company from removing and destroying a street railway laid in conformity to the grade across its road-bed.—BUFFALO, R. & P. CO. V. DU BOIS TRACTION PASS. RY. CO., Penn., 24 Atl. Rep. 179.

54. INJUNCTION BOND—Demurrer.—In an action on an undertaking to pay all damages and costs accruing by reason of an injunction, if such injunction should not be sustained, the sufficiency of the complaint cannot be questioned by a demurrer to allegations showing how plaintiff was damaged, as the cause of action accrued on the dissolution of the injunction.—BOOS V. MORGAN, Ind., 31 N. E. Rep. 39.

55. INJUNCTION TO RESTRAIN SUIT AT LAW.—Where a defendant in a suit at law applies by bill in equity for relief against matters involved in such suit at law, and for an injunction to restrain the plaintiff from proceeding with such suit at law, and it appears that under his pleadings in the common-law action he can therein obtain the same relief to which the allegations of his bill would entitle him, an injunction to restrain such suit at law is properly refused.—COHEN V. L'ENGLE, Fla., 29 South. Rep. 47.

56. JUDGMENT AGAINST WIFE.—A common-law judgment against the wife creates no lien upon her equitable estate under such a conveyance.—SIPLEY V. WASS, N. J., 24 Atl. Rep. 233.

57. JUDGMENT—Amendment.—On motion and notice after the close of the term at which a judgment for one dollar and all costs is rendered, such judgment cannot be amended so as to be for one dollar costs only, under Code, § 592, though the proposed amendment would correct an error of the court.—PURSLEY V. WICKLE, Ind., 30 N. E. Rep. 1115.

58. JUDGMENT—Setting Aside.—Where, after a cause has been sent to another circuit on a change of venue on the application of plaintiff, acquisced in by defendant, such court, having jurisdiction of the subject-matter, and after having assumed jurisdiction, arbitrarily sends the case back to the first circuit, where plaintiff procures a judgment without any appearance by defendant, the judgment should be set aside on motion of defendant supported by an affidavit that he had no notice that the case was so sent back, and that he has a meritorious defense.—CODEMAN V. FLOYD, Ind., 31 N. E. Rep. 75.

59. JUDGMENT—Vacating Satisfaction.—Rev. St. 1881, § 765, provides that where a sheriff's deed is invalid by reason of any defect or irregularity in the proceedings, and satisfaction of the judgment has been entered thereon, the purchaser may have the entry of satisfaction vacated, and judgment rendered in his favor: Held, that an execution plaintiff is entitled to relief where he purchases under his own execution, and the title fails.—MEHRHOFF V. DIFFENBACKER, Ind., 31 N. E. Rep. 41.

60. LIMITATIONS — Purchase by Agent at Tax Sale.—The purchase by an agent at a tax sale of his principal's land creating a trust by implication is within Act April 22, 1856, § 6, limiting to five years from discovery of the fraud an action to enforce an implied trust, as to realty. —MCKEAN & ELK LAND & IMP. CO. V. CLAY, Penn., 24 Atl. Rep. 211.

61. LOST DEED—Evidence —One who has assisted in searching in the office of the county clerk, under the direction of the latter, for a deed left therein for record, is a competent witness to prove the loss of such deed in order to lay a foundation for secondary evidence thereof. It is not necessary in such case to call the clerk in order to establish the loss of the deed *prima facie*.—BUCHANAN V. WISE, Neb., 52 N. W. Rep. 163.

62. MARRIED WOMEN—Liabilities as Sureties.—Rev. St. 1881, § 5119, providing that "a married woman shall not enter into any contact of suretyship, whether as indorser, guarantor, or in any other manner, and such contract as to her shall be void," invalidates a note executed by a married woman, in the hands of an innocent purchaser for value, acquired in the regular course of trade, unless the woman has by her conduct or representations estopped herself to claim the benefit of the statute.—VOREIS V. NUSSBAUM, Ind., 31 N. E. Rep. 70.

63. MASTER AND SERVANT—Defective Ways.—Acts 1887, ch 270, rendering a master liable for injuries to a servant because of defects in "ways, works, or machinery connected with or used in the business of the employèr," does not make a railroad company liable for injuries sustained by its employee from the defective track of another company, over which it had no control, and which it sometimes went upon to get cars under a license.—TRASK V. OLD COLONY R. CO., Mass , 31 N. E. Rep. 6.

64. MASTER AND SERVANT — Fellow-servants.— The plaintiff, a servant of the third party, was engaged, under the direction of the servant of defendant, in blasting rock. The two men pursued a method of withdrawing from the rock an unexploded charge of powder, which method proved to be dangerous. The two men worked together in this operation: Held, that the defendant was not responsible to the plaintiff for injury suffered by him, upon the ground that the act was dangerous.—CORNEILSON V. EASTERN RY CO. OF MINNESOTA, Minn., 52 N. W. Rep. 224.

65. MASTER AND SERVANT—Latent Defects.—Defendant, by its manager, undertook to personally supervise the removal of a defective and unsafe telephone pole, but which to outward appearance was safe, and ordered plaintiff, an employee, to climb it, and detach the wires. The cutting of the wires caused the pole to break: Held that, in the absence of contributory negligence, defendant's liability depended not on whether it could have discovered the defects before plaintiff obeyed its orders, but whether it used the means a prudent man would or ought to use to discover them, and failed to make known to plaintiff the defects and consequent probable risk.—SOUTHWESTERN TELEGRAPH & TELEPHONE CO. V. WONGHTER, Ark., 19 S. W. Rep. 575.

66. MASTER AND SERVANT—Negligence.—Men who are stowing away bales of hay in the shed of a railroad company are fellow-servants; and one who is injured by the falling of a bale, due to the carelessness of the others, cannot recover of the company.—FITZGERALD V. BOSTON & A. R. Co., Mass., 31 N. E. Rep. 7.

67. MASTER AND SERVANT — Negligence of Fellow-servants.—Where defendant employed a person to fill its ice house with ice, and furnished him with an apparatus, by which the ice was hoisted, defendant is not liable to an employee of such person for injuries resulting from the inexperience of such employee's fellow-servants in working such apparatus.—PIETTE V. BAVARIAN BREWING CO., Mich., 52 N. W. Rep. 152.

68. MASTER AND SERVANT—Scope of Employment.—One hiring a bill-poster to post bills on certain boards, for a certain sum is not liable for the death of a horse frightened by the bills, left by the bill-poster in the road 15 miles from the bill boards, such act not being within the scope of the bill-poster's employment, even if he is a servant, and not an independent contractor. —SMITH V. SPITZ, Mass., 31 N. E. Rep. 5.

69. MASTER AND SERVANT — Superintendence.—Under the employers' liability act, making the employer liable for the negligence of a person "intrusted with and exercising superintendence," an employer is not liable for the act of an engineer who was running an engine in unloading a vessel, in raising a fall from the hold of the vessel, instead of lowering it, as signaled from the hold, thereby causing an injury to one of the employees in the hold, engaged with the engineer in removing the cargo, though the engineer employed the men, and set them to work, and on several occasions went into the hold for a few moments at a time, and showed them how to fasten the bundles.—CASHMAN V. CHASE, Mass., 31 N. E. Rep. 4.

70. MECHANICS' LIENS.—An auditor, appointed to distribute the fund arising from the sale of the property of an oil refinery described in mechanics' liens on which judgments have been recovered, cannot restrict the lien of such jugments so a portion of such property, on the ground that the curtilage designated by the claimants is more than sufficient for the necessary uses of the oil refinery.—SICARDI V. KEYSTONE OIL CO., Penn., 24 Atl. Rep. 161.

71. MINING CLAIM—Location by Alien.—Where a mining claim was located by an alien, conveyed by him to L, another alien, who subsequently conveyed to R, a citizen, solely for the purpose of acquiring title in L's interest, and R afterwards conveyed to a trustee, who transferred the same to a mining company, the stock of which was principally owned by L, the location being invalid, such trustee and mining company took no title as against plaintiff, who made a *bona fide* location of a conflicting claim, prior to the trustee's transfer, and the government officials were not authorized to issue a certificate of purchase or a patent on such invalid location.—LEE V. JUSTICE MIN. CO., Colo., 29 Pac. Rep. 1020.

72. MORTGAGE—Foreclosure.—Where, under a decree of foreclosure, a mortgagee obtains a regular sale of the mortgaged premises for a fair price, he is entitled to a confirmation of the sale, and satisfaction of his decree, without regard to the equities acquired in the mortgaged premises by a purchaser from the mort-

gagor *pendente lite*.—PENDLETON V. SPEAR, Ark., 19 S. W. Rep. 578.

73. MORTGAGE — Subrogation.—A senior mortgagee purchased the mortgaged premises on foreclosure, and afterwards quitclaimed to plaintiff, a junior mortgagee, who paid in full the debt secured by the senior mortgage. Afterwards, it was adjudged that no title passed by the sale. Plaintiff then sold under his own mortgage, and bid in the property, and took a deed which passed to him the legal title, and entered into possession: Held, where plaintiff, while retaining such title and possession, sought to foreclose the mortgagor's equity of redemption under the senior mortgage, that he was not entitled to be subrogated to the rights of that mortgage.—LONG V. LONG, Mo., 19 S. W. Rep. 537.

74. MUNICIPAL CORPORATIONS—Annexation.—No part of a specified territory can be annexed to a city without a public notice of the hearing, as prescribed by Mansf. Dig. § 785, even though a majority of the property holders of such territory voluntarily appear at the hearing, and consent to the annexation.—GUNTER V. CITY OF FAYETTEVILLE, Ark., 19 S. W. Rep. 577.

75. MUNICIPAL IMPROVEMENTS — Assessment.—Where an ordinance establishes an ally in continuation of an older one (which extended partly through a city block)' all the owners of property abutting on the completed ally "in said block" are liable to assessment for "benefits," under the charter of St. Louis providing "that, in the opening of any ally, the benefits shall be paid by the owners of property in said block abutting on the proposed ally."—CITY OF ST. LOUIS V. LANE, Mo., 19 S. W. Rep. 533.

76. MUNICIPAL CORPORATION—Improvement Districts.—The purpose of a sewer district designated by a city council under the provision of Mansf. Dig. §§ 825-895, relative to local improvements in cities, being the construction of sewers, and the object and authority of its board of improvement or commissioners, appointed under such provisions, being limited to such construction and the paying therefor, the commissioners cannot, after the completion of the sewers, bind the district, or themselves as a board, by a contract for water for flushing.—PINE BLUFF WATER & LIGHT CO. V. SEWER DIST. NO. 1, Ark., 19 S. W. Rep. 576.

77. MUNICIPAL CORPORATION — Negligence of Policeman.—A city is not liable for injuries resulting from the negligence of a policeman appointed by it, in shooting at a dog running at large without being muzzled, in violation of an ordinance, and making it the duty of policemen to kill dogs so found, since the city in enforcing such an ordinance is not acting in the management of its private or corporate concerns, but as the representative of the State, in the interest of the public and the maxim *respondeat superior* does not apply.—WHITFIELD V. CITY OF PARIS, Tex., 19 S. W. Rep. 566.

78. NATURAL GAS WELL—Diversion of Gas.—A person who has a natural gas well on his premises has the right to explode nitroglycerin therein for the purpose of increasing the flow, although such explosion may have the effect to draw gas from the land of another.—PEOPLE'S GAS CO. V. TYNER, Ind., 31 N. E. Rep. 59.

79. NEGLIGENCE — Railroad Bridge—Floods.—A railroad company is liable for injuries to property caused by the sweeping away of its bridge by an extraordinarily high flood, if the bridge was carried away because of its negligent or unskillful construction; but if it was properly constructed, and was carried away only by reason of the unusual destructiveness of the flood, the company is not liable.—PIEDMONT & C. RY. CO. V. MCKENZIE, Md., 24 Atl. Rep. 157.

80. NEGOTIABLE INSTRUMENT.—A note reciting that "we, the T. P. Company, promise to pay" etc., and signed by each of defendants as president and secretary, respectively, is the obligation of defendants, it not appearing whether the T. P. Company was a corporation, a partnership, or a voluntary association of persons.—DAY V. RAMSDELL, Iowa, 52 N. W. Rep. 208.

81. NEGOTIABLE INSTRUMENTS — Indorsement.—When the back of a note is covered by various indorsements, an assignment of the note, written on a piece of paper pasted to the note, will pass the legal title.—BROWN V. BOOKSTAVER, Ill., 31 N. E. Rep. 17.

82. NEW TRIAL — Grounds.—Where a party claiming under a deed from a county treasurer asserts, in the hearing of the opposite party, that the deed is lost, and then calls secondary evidence to prove its contents, without any objection being made as to the necessity for further proof of loss, but only that the proposed evidence did not show anything different from the record of the sale in the commissioner's office, the failure to make such proof cannot be assigned as reason for a new trial.—LEHIGH VALLEY COAL CO. V. WARD, Penn., 24 Atl. Rep. 183.

83. NUISANCE—Pollution of Stream.—Plaintiffs brought an action for damages for the pollution of a stream by a factory. The defense was uninterrupted use of the stream for 20 years. There was evidence that, within less than 5 years from action brought, defendant had so straightened the bed of the stream, and increased the volume of water by piping from a distance, that a much greater amount of impurities was deposited on plaintiff's land than before: Held, that defendant's right of use by prescription did not extend to its enlarged and changed use of the stream, and that plaintiffs were entitled to damages therefor.—MISSISSIPPI MILLS CO. V. SMITH, Miss., 11 South. Rep. 26.

84. PARTY WALLS.—Code, § 2019, which provides that the owner of a city lot, "who is about to build contiguous to the land of his neighbor, may, if there be no wall on the line between them, build a brick or stone wall, and rest the one-half of the same on his neighbor's land," does not authorize the erection of such a wall where the wall, if erected, will destroy a stairway on the adjoining land, since the expression "wall on the line" refers, not merely to the actual wall of a building, but to any part of a building.—CORNELL V. BICKLEY, Iowa, 52 N. W. Rep. 192.

85. PAYMENT BY DRAFT — Failure to Collect.—Where defendant sent a draft to plaintiff to be credited as a payment on account, and plaintiff was not guilty of laches in his efforts to collect the same, and, failing to make a collection thereof, returned it to defendant within a reasonable time thereafter, plaintiff's account is not chargeable with the amount of such draft.—EDWARDS V. HARVEY, Colo., 29 Pac. Rep. 1024.

86. PARTNERSHIP—Accounting.—In an action for the dissolution of a copartnership and an accounting, plaintiff, although he has drawn nothing from the firm, cannot recover interest on money drawn out of the firm by defendants, unless their was a previous agreement to this effect, or a balance struck between the parties on a settlement of the partnership business.—KEMMERER V. KEMMERER, Iowa, 52 N. W. Rep. 194.

87. PARTNERSHIP—Dissolution.—In an action against the members of a firm by a transferee of a note signed in the firm name, and made to one of its members, the admission in plaintiff's reply that the note was transferred after the dissolution of the firm and the maturity of the note does not entitle defendants to judgment on the pleadings; there being no allegation or admission that plaintiff had notice of the dissolution when the transfer was made.—KNAUS V. DUDGEON, Mo., 19 S. W. Rep. 535.

88. PARTNERSHIP—Note.—The mere partnership relation does not authorize a partner to execute bills or notes in the firm name for the accommodation of, or as surety for, a third person, nor will the mere fact that the partnership may obtain some indirect or incidental benefit from the transaction authorize him to do so.—VAN DYKE V. SEELYE, Minn., 52 N. W. Rep. 215.

89. PARTNERSHIP—Ultra Vires.—Where the managers of a limited partnership association for the manufacture of steel springs, to protect the company against a combination of steel makers which operated against them by requiring them to pay more for their steel than their competitors who made their own steel, purchase stock in a certain iron and steel company with the

surplus earnings of the spring company, such investment is not *ultra vires*, there being nothing in the spring company's articles which prohibits it from manufacturing its own steel.—LAYING V. A. FRENCH SPRING CO., Penn., 24 Atl. Rep. 215.

90. PRINCIPAL AND AGENT—Right to Compensation.—Defendant could not avoid liability for services rendered in effecting a loan for her, to be secured by mortgage, on the ground that there was an agreement that the money was to be used in the erection of a saw-mill for the purpose of converting timber into lumber, and that the mortgage contained a clause restraining her from cutting timber except for necessary and ordinary purposes or requirements of the farm, when in her written application for the loans she stated merely that the money was to be used "for the education of children and for general improvement."—LOAN CO. OF ALABAMA V. DEANS, Ala., 11 South. Rep. 17.

91. PRINCIPAL AND SURETY—Estoppel by Recitals.—Sureties are estopped to deny the facts recited in their obligation.—HAYDEN V. COOK, Neb., 52 N. W. Rep. 165.

92. PRIVATE MARKETS.—A city, under the power to regulate markets, may adopt such regulations as are necessary for the preservation of public health and conduce to the public interest.—STATE V. GARIBALDI, La., 11 South. Rep. 36.

93. RAILROAD COMMISSIONERS — "Car Load" Lots.—Where the term "car load," as used in Rev. St. 1879, § 833, providing for the appointment of railroad commissioners, the division of freights into certain classes, and the fixing of maximum rates at so much per "car load" for each class, has been construed by the commissioners, whose duty it is to enforce the said statute, as meaning, in the light of existing usage, 10 tons instead of all that a car can safely carry, this construction, being reasonable and just, will be upheld, especially where it has been acted upon long enough to have become a rule.—ROSS V. KANSAS CITY, ST. J. & C. B. R. Co., Mo., 19 S. W. Rep. 541.

94. RAILROAD COMPANIES — Negligence.—It is negligence *per se* for a railroad company to run a train of cars in violation of a city ordinance limiting the rate of speed, and if any one is injured in consequence of such negligence, without fault on his part, he is entitled to recover damages.—PENNSYLVANIA CO. V. HORTON, Ind., 31 N. E. Rep. 45.

95. RAILROAD COMPANIES — Street Railroads — Negligence.—An open summer street car had a step running along its full length on the side, 13 inches below the floor of the car. Back of the step, and resting on it, was a board 4 inches wide, above this is an open space 3 3-4 inches wide, and above the latter another board, 5 1-4 inches in width, which extended to the car floor: Held, that the car was sufficiently safe, and the company was not liable for injuries sustained by a passenger who, in passing from the step to the floor, got his foot caught in the open space between two boards by stepping on the lower one.—KELLER V. HESTONVILLE M. & F. PASS. R. Co., Penn., 24 Atl. Rep. 159.

96. RAILROAD CROSSINGS—Signals.—The provisions of How. St. § 3375, that the whistle of a locomotive shall be sounded at least 40 rods before a highway crossing is reached, and that the company shall be liable for all damages which shall be sustained by any person by reason of neglect so to do, inures to the benefit not only of persons on the highway, but to one injured by reason of the non-giving of the signal, while lawfully using a private crossing at a distance from the highway.—SANBORN V. DETROIT, B. C. & A. R. Co., Mich., 52 N. W. Rep. 153.

97. RECEIVERS—Injunction Bond.—Where the sale of an insolvent's stock of goods by his trustee was enjoined, and a receiver appointed, the sureties on the injunction bond are not liable for losses resulting from the appointment of the receiver and the sale of the property by him.—WOOD V. HOLLANDER, Tex., 19 S. W. Rep. 551.

98. RELEASE AND DISCHARGE.—The acceptance of $15 "in full" for "damage sustained by bull hooking horse" is a bar to an action to recover the value of the horse upon his subsequent death.—CURRIER V. BILGER, Penn., 24 Atl. Rep. 168.

99. REPLEVIN. — Where cattle covered by a chattle mortgage are replevied by the mortgagee from the mortgagor and sold, defendant may recover in the replevin case the amount received for the cattle in excess of the debt.—RHOADS V. GATLIN, Colo., 29 Pac. Rep. 1019.

100. RISKS OF EMPLOYMENT.—A brakeman familiar with flying switches was, while making one at a switch which he had turned before a number of times, but never for that purpose, struck by the cars, the switch being very near the track, on account of an abutment, and it being necessary to stand between the track and the switch in operating it: Held, that the risk was an obvious one, which he had assumed.—COOMBS V. LITCHBURG R. Co., Mass., 30 N. E. Rep. 1140.

101. SALE — When Title Passes.—Plaintiff agreed to deliver to the defendants a certain number of logs, to be sawed into lumber at so much per thousand, and to sell to defendants the lumber thus manufactured at different prices, according to quality, payment to be made in so many days after defendants should have shipped and sold the said lumber. No inspection for the purpose of determining the quality and quantity of the lumber was provided for. The parties, however, afterwards agreed upon an inspection, and that it should take place at the time the shipments were made. There was also evidence that plaintiff had inquired about the said shipments, and had told defendants that, if they did not intend to ship soon, he desired to place some insurance upon the lumber: Held, that the contract was not a contract of sale, and that the question as to when the title passed was for the jury.—BLODGETT V. HOVEY, Mich., 52 N. W. Rep. 149.

102. SALE UNDER EXECUTION—Fraudulent Conveyance.—The vendee of the grantee in a deed executed before the recovery of a judgment against the maker has a title superior to that of the purchaser at a sheriff's sale, and it is immaterial that such second vendee had notice of the judgment.—OLD NAT. BANK OF EVANSVILLE V. LINDLEY, Ind., 31 N. E. Rep. 62.

103. SCHOOL TRUSTEES—Meetings.—Where, at a regular meeting of the six school trustees, and after a number of ballots for school superintendent, not resulting in an election, three of the trustees refuse to act longer or take further part in the proceedings, and withdraw from the place where the ballotting is being held into the crowd of spectators, but without leaving the room, the quorum is not broken, though they may refuse to vote, and protest against further action; and where the three remaining trustees cast their ballots for a person, he is duly elected, the other trustees being properly treated as present and not voting.—STATE V. VANOSDAL, Ind., 31 N. E. Rep. 79.

104. STATE LEGISLATION.—The act of the California legislature of April 1, 1876, entitled "An act concerning corporations and persons engaged in the business of banking," does not prohibit such corporations or persons from maintaining actions in the national courts, nor has the legislature the power so to do; nor does the act apply to business done by a foreign corporation without the State.—BARLING V. BANK OF BRITISH NORTH AMERICA, U. S. C. C. of App., 50 Fed. Rep. 260.

105. STATUTE—Construction of.—In the construction of a statute it is a general rule, reasonable to presume that the same meaning is intended for the same expression in every part of the act. But the presumption is not controlling; and where it appears that by giving it effect an unreasonable result will follow, and the manifest object of the statute be defeated, the court is at liberty to disregard the presumption, and attach a meaning to the word in question which will make the act consistent with itself, and carry out the true purpose and intent of the law-makers.—HENRY V. TRUSTEES OF PERRY TP., Ohio, 30 N. E. Rep. 1122.

106. STATUTES — Construction.—It is an established rule of construction that a subsequent statute treating of a subject in general terms, and not expressly contradicting the provisions of a prior act, shall not be construed as intended to affect the more particular and positive provisions of a prior act, if any other reasonable construction can be adopted.—JACKSON V. BOARD OF SUP'RS. OF WASHINGTON COUNTY, Neb., 52 N. W. Rep. 163.

107. TAXATION — Exemptions. — A foundry in which "railing, posts, and bridges, and such things" are manufactured, and iron, brass, and other metals are cast, is not exempt from taxation, under the article of the constitution exempting capital, machinery, and other property employed in the manufacture of machinery or agricultural implemenis, unless they are used in the said manufacture of machinery or implements.—BENEDICT V. CITY OF NEW ORLEANS, La., 11 South. Rep. 41.

108. TAX TITLES — Possession. — Where a person who owns an undivided half interest in land, and who claims title to the whole, is in actual possession of the land, such does not inure to the benefit of the holder of a tax title to the other half of the land, since they are not tenants in common.— WILLCUTS V. ROLLINS, Iowa, 52 N. W. Rep. 199.

109. TAX TITLES — Tenant for Life.—A purchase by a tenant for life of a tax title to the land occupied by him inures to the benefit of those in remainder, and will not entitle him to the benefit of laws 1888, ch. 23, § 4, providing, with respect to certain tax titles sold and conveyed by the public authorities, that 12 months' occupation of such lands shall bar any action to recover the same. — JONES V. MERRILL, Miss., 11 South. Rep. 23.

110. TELEGRAPH COMPANIES—Penalty.—Act March 31, 1885, imposing a penalty on a telegraph company for refusing to "transmit over its wires to localities on its line" any message tendered for transmission, does not impose a penalty for the company's refusal to deliver a message after it has been transmitted over its wires to the locality on its line to which it is addressed.—BROOKS V. WESTERN UNION TEL. CO., Ark., 19 S. W. Rep. 572.

111. TRESPASS—Adjoining Land-owners—Lateral Support.— The measure of damages for depriving land of lateral support is the actual damage to the land by the loss of and injury to the soil alone; and is neither the cost of restoring the land to its former condition, nor its diminished market value. — MCGETTIGAN V. POTTS, Pa., 24 Atl. Rep. 198.

112. TRIAL—Misconduct of jury.—An affidavit that the jury failed to deliberate upon their verdict, but decided and found the same by casting lots, which does not state how affiant obtained his information, is no ground for a new trial, since it is not to be supposed that he was illegally in the jury room, or hovering outside, listening to the deliberations of the jury, and since, if his information came from the bailiff, the bailiff's affidavit should be filed, and, if it came from a juror, it would be inadmissible to impeach the verdict. —EAKEN V. THOMPSON, Ind., 30 N. E. Rep. 1114.

113. TRUSTS—Execution.— Where a father delivered notes to his son in trust to be collected, and part of the proceeds paid to his daughter, and the son accepted the trust, the notes were no longer a part of the father's estate, and were not affected by a will making a different disposition of them.—HAXTON V. MCCLAREN, Ind., 31 N. E. Rep. 48

114. TRUSTS— Validity. — A son who had just attained his majority, who had no knowledge of business, and who was intemperate, and easily influenced, was induced by his father, a wealthy man, of large experience and force of character, to convey to him, for the express consideration of $600, all his property, in trust for himself for life, remainder to his personal representatives. There was no actual consideration for the deed. The father subsequently reconveyed the property, and the son conveyed the land in controversy to *bona fide* purchasers, after which he died: Held, that his legal representatives had no title to the land that equity would enforce, as the deed of trust was unconscionable, was procured by fraud and undue influence, and was revoked by the reconveyance. — EWING V. WILSON, Ind., 31 N. E. Rep. 64.

115. USURY—Evidence.—In an action to recover a loan which was negotiated through the plaintiff's agent, in order to sustain a plea of usury, it is necessary for the defendant to prove, not only that the agent retained money in excess of the lawful interest, but that his retention of the same was authorized or ratified by plaintiff. — GREENFIELD V. MONAGHAN, Iowa, 52 N. W. Rep. 193.

116. VENDOR AND VENDEE—Equitable Lien.— A vendee of land, unable to make a payment of purchase money due, borrowed money therefor from P, and executed to him the following note: "On · · · I promised to pay P · · ·, as purchase money furnished by P, and to have the same effect as though the land had been bought from P, it being the farm I now live on:" Held, that P had an equitable lien on the land for the money advanced, which was superior to the rights of creditors or purchasers with actual notice. — TRIMBLE V. PUCKETT, Ky., 19 S. W. Rep, 591.

117. WATERS— Surface Water. — The owner of upper land may collect the surface water by means of underground drains, and discharge the same on the lower land at one point, if the point of discharge is the natural watershed of both tracts, though the flow of water is greater by the use of such drains than by the use of surface drains.— MEIXELL V. MORGAN, Pa., 24 Atl. Rep. 216.

118. WILLS — Construction. — A devise of land in the "northwest quarter" of a certain section cannot be construed to mean land in the "southwest quarter" of said section, since such a construction would amount to a reformation of the will.—BINGEL V. VOLZ, Ill., 31 N. E. Rep. 13.

119. WILLS— Construction. — A testator devised to his son such an amount as should be paid on a certain note held by him against the son. During his life testator gave the note up to the son without payment: Held, that the son was entitled to a legacy of the amount of the note. — IN RE LEWIS, R. I., 24 Atl. Rep. 146.

120. WILLS—Construction. — A will, after giving a life estate in 240 acres of land to testator's wife, and, *inter alia*, legacies to the children of his two deceased sons, provided: "I further will, in regard to my other land, that if the heirs cannot agree upon a satisfactory division of them, that they divide them to their own notion; if not, they can sell the lands and divide the proceeds equal amongst my children that are now living," naming them: Held, that it was testator's intent to devise the land to his living children, and that the language was adequate for that purpose.—WATSON V. WATSON, Mo., 19 S. W. Rep. 543.

121. WILLS — Construction. — Where a will imperatively required the executors thereof to sell real estate in fee after a short time, and during that time to control the property by leasing it, collecting the rents, paying the taxes, insurance, and repairs, and incidental expenses in its management, and made no other disposition of the property, held, that the fee went to the executors in trust for the purpose aforesaid.—CRANE V. BOLLES, N. J., 24 Atl. Rep. 237.

122. WILL—Devise to Husband and Wife.—Under 4 Rev. St. (8th Ed.) p. 2461, § 2, requiring courts, in construing instruments creating an estate in lands, to give effect to the intent of the parties, a will giving testator's son and the son's wife "the use" of a farm on which they reside, for "their use, benefit and support during their natural lives," gives them an estate in common, and not by the entirety, since otherwise the evident intention to provide for the wife might be defeated.— MINER V. BROWN, N. Y., 31 N. E. Rep. 24.

123. WILLS — Execution. — Where testatrix, owing to her weak physical condition, was unable, without as-

sistance, to sign her name; and called upon her daughter to guide her hand, who thereupon directed it in forming the letters composing testatrix's name, the signature is sufficient; under Sayles' Civil St. art. 4859, providing that a will shall be signed "by the testator, or by some other person by his direction and in his presence." — TREZENANT v. RAINS, Tex., 19 S. W. Rep. 567.

124. WITNESS — Credibility. — A court or jury is not bound to accept the testimony of a witness as true, merely because there is no direct testimony contradicting it, if it contains improbabilities and contradictions, which alone or in connection with other facts and circumstances in evidence furnish a reasonable ground for concluding that it is false. ANDERSON v. LILJENGREN, Minn., 52 N. W. Rep. 219.

125. WITNESS— Examination.—Where, in an action to recover damages for personal injuries, defendant pleaded a release and discharge, and plaintiff testified that it was not read or explained to him; that he could only read and write his own name, and that the paper was represented to him to be a receipt to show that defendant was making him a present of money, there was no error in refusing to permit him to be asked what he understood he was signing, and whether he know the meaning of the word "release," no offer being made to prove anything other than what he had just testified. — MCGUIRE v. LAWRENCE MANUF'G CO., Mass., 31 N. E. Rep. 3.

ABSTRACT OF DECISIONS OF MISSOURI COURTS OF APPEAL.

KANSAS CITY COURT OF APPEALS.

EVIDENCE—Expert.—An expert may give an opinion based on a state of facts which he himself has witnessed, or which are detailed to him by other witnesses or put to him in form of a hypothetical case. The subject must be one of science or skill, or one of which observation and experience has given the opportunity and means of knowledge, which exists in reason rather than in descriptive facts, or one upon which men of common information are not capable of forming a judgment.—BENJAMIN v. MET. ST. RY. CO.

FRATERNAL BENEFICIAL ASSOCIATION—Conditions in Beneficiary Certificate.—An officer of a fraternal beneficial association has no authority to waive any of its laws which relate to the substance of a contract between an individual member and his associate in their associate capacity. The members of such an association are conclusively presumed to know its laws, and the authority of its officers, who are special agents. A provision for the benefit of the association in a contract, may be waived by it, but the essential facts must be shown before there can be a waiver.—HARVEY v. THE GRAND LODGE OF A. O. U. W.

MECHANIC'S LIEN—Contiguous Lots.—In an action to enforce a mechanic's lien, held: "contiguous lots," referred to in Sec. 6729 R. S., mean the lots as they are bounded and described on the recorded plats of cities and towns, when there are such plats, and such as lie adjacent to or adjoining each other, though other houses may stand on the same lots between those against which it is sought to enforce the lien.—BULGER v. ROBERTSON.

MECHANIC'S LIEN—Affidavit—Amendment.—In an action to enforce a mechanic's lien the affidavit to lien paper was not made by lienor, nor was it disclosed in the lien paper, or elsewhere in the record, that the affidavit made it for the lienor, but his agency was proven at the trial and the evidence thereof preserved in the bill of exceptions. Plaintiff asked to be allowed to amend his petition in appellate court, alleging that affiant made the affidavit for the lienor: Held, the agency of the affiant must appear in the record proper, and it will not suffice to make it appear in testimony at the trial, and the defect is fatal to the lien. In furtherance of justice plaintiff was allowed to amend, and judgment was affirmed. — ROACH & RINGER CO. v. JOEL HARFORD.

PARTNERSHIP—Parties.—In an action of replevin, held, that mere participation in the profits and losses does not necessarily constitute a partnership. There must be such a community of interests as empowers each party to make contract, incur liabilities, manage and dispose of the whole business and property. A partnership in profits may exist without including title to the property out of which profits may arise. A partner cannot maintain replevin for property belonging to a partnership. A partnership, suing as such, cannot recover property belonging to only one of such partners.—DEYERLE v. HUNT.

PEDDLERS—License Tax.—One who goes from place to place carrying with him various articles of merchandise, which he does not sell but uses as samples, soliciting orders which as referred to his employer, for future delivery, whether at retail or wholesale, whether to be delivered at residence, shop or store, and afterwards delivers the goods sold, and collects a cash payment, and takes an obligation from purchaser to pay to his employer the balance in future installments, is not a peddler, and not subject to license tax provided for in chapter 125 R. S. 1889.—STATE OF MO. v. HOFFMAN.

PEDDLERS — Town Ordinance. — Defendants were charged with selling goods as peddlers, without license, in violation of ordinance regulating peddlers, which provided: "That any person who shall engage in selling any drugs, groceries, merchandise—except books, by going from place to place to sell the same, or shall sell the same by first taking an order and afterwards delivering the article, either in person or by agent, or shall sell the same by public outery in the streets of said town, is declared a peddler:" Held, the ordinance is invalid. It goes beyond the powers delegated by the legislature in the town charter. Grants of such powers are strictly construed. The corporation cannot extend the scope of its powers by the arbitrary definition of words, so as to include more than was intended by the legislature. "Peddlers," as defined by the legislature Sec. 7211 R. S. 1889, does not include commercial agents or drummers.—TOWN OF TRENTON v. CLAYTON.

REMEDIES—Election of.—In an action for damages, held: "Where one wrongfully sells the property of another, the latter may sue for the tort, replevy the property, or waive the tort and sue for the money received for the property; and when he makes his election, he is bound by it. But, when property seized by attachment is sold by order of court, the purchaser's title is good against the world, notwithstanding the property did not belong to the defendant in attachment; the owner cannot elect to replevy his property, and the acceptance by him of the proceeds of such sale, will not bar a suit in trespass.—FRANK v. EBY.

SPECIAL TAX BILL—Amendment of.—In a suit on a special tax bill, where the work for which the bill was issued was done under a valid contract, held, that where the city official, whose duty it is to issue the tax bill, issued a bill which is void for defects therein contained, the authority of such official to issue a valid tax bill for the same work is not impaired, and he may do so after his term of office expires. The case stands as if no tax bill had been issued. The duty enjoined upon the officer remains unperformed until he issues a valid tax bill.—RILEY v. STEWART.

TELEGRAPH COMPANY—Stipulations in Blanks.—In a suit to recover the penalties provided for in Secs. 883 and 887, R. S. 1879, held that where the printed conditions on the message blank required that any claim against the company must be made in writing, by the person complaining, within sixty days after receipt of the message by the company, and no such claim was presented by plaintiff within the time limited, plaintiff will be barred of his cause of action, no question as to the time of the discovery of the company's failure to discharge its duty arising in the case.—MONTGOMERY v. WESTERN UNION TEL. CO.

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